

# Decisions of the United States Court of International Trade

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(Slip Op. 00-95)

FAG ITALIA S.p.A., BARDEN CORPORATION (U.K.) LIMITED,  
THE BARDEN CORPORATION AND FAG BEARINGS CORPORATION, PLAINTIFFS,  
v. UNITED STATES, DEFENDANT AND THE TORRINGTON COMPANY,  
DEFENDANT-INTERVENOR

Court No. 98-07-02528

Before: *Senior Judge* NICHOLAS TSOUCALAS

Plaintiffs, FAG Italia S.p.A., Barden Corporation (U.K.) Limited (“Barden”), The Barden Corporation and FAG Bearings Corporation (plaintiffs collectively “Barden-FAG”), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of the United States Department of Commerce, International Trade Administration’s (“Commerce”) final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 33,320 (June 18, 1998), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy, Romania, and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 40,878 (July 31, 1998). In particular, Barden-FAG contends that Commerce erred in calculating profit for constructed value under 19 U.S.C. § 1677b(e)(2)(A) (1994) and Barden argues that Commerce unlawfully accepted The Torrington Company’s below-cost sales allegation under 19 U.S.C. § 1677b(b)(2)(A) (1994).

Held: Plaintiffs’ USCIT R. 56.2 motion is denied in part and granted in part. Commerce’s final determination is affirmed in all other respects.

[Plaintiffs’ motion is denied in part and granted in part. Case remanded.]

Dated: August 4, 2000

*Grunfeld, Desiderio, Lebowitz & Silverman LLP (Max F. Schutzman, Andrew B. Schroth and Mark E. Pardo)* for plaintiffs.

*David W. Ogden*, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*, Assistant Director); of counsel: *David R. Mason* and *Myles S. Getlan*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

*Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and Lane S. Hurewitz)* for defendant-intervenor.

## OPINION

TSOUCALAS, *Senior Judge*: Plaintiffs, FAG Italia S.p.A., Barden Corporation (U.K.) Limited (“Barden”), The Barden Corporation and FAG Bearings Corporation (plaintiffs collectively “Barden-FAG”), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of the United States Department of Commerce, International Trade Administration’s (“Commerce”) final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* (“*Final Results*”), 63 Fed. Reg. 33,320 (June 18, 1998), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy, Romania, and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews* (“*Amended Final Results*”), 63 Fed. Reg. 40,878 (July 31, 1998). In particular, Barden-FAG contends that Commerce erred in calculating profit for constructed value (“CV”) under 19 U.S.C. § 1677b(e)(2)(A) (1994) and Barden argues that Commerce unlawfully accepted The Torrington Company’s (“Torrington”) below-cost sales allegation under 19 U.S.C. § 1677b(b)(2)(A) (1994).

## BACKGROUND

This case concerns Commerce’s eighth administrative review of 1989 antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof (“AFBs”) imported from Italy and the United Kingdom for the period of review covering May 1, 1996 through April 30, 1997. In accordance with 19 C.F.R. § 353.22(c) (1996), Commerce initiated the applicable administrative reviews of these orders on June 17, 1997 and published the preliminary results of the subject reviews on February 9, 1998. *See Antifriction Bearings (Other Than Tapered Roller Bearings)[a]nd Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and [t]he United Kingdom* (“*Preliminary Results*”), 63 Fed. Reg. 6512 (citations omitted). Commerce published the *Final Results* on June 18, 1998, *see* 63 Fed. Reg. at 33,320, and the *Amended Final Results* on July 31, 1998, *see* 63 Fed. Reg. at 40,878.

Since the administrative reviews at issue were initiated after December 31, 1994, the applicable law in this case is the antidumping statute as amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995).

## JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

## STANDARD OF REVIEW

In reviewing a challenge to Commerce’s final determination in an

antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); see *NTN Bearing Corp. of America v. United States*, 24 CIT \_\_\_, \_\_\_, Slip Op. 00-64, at 8-10 (June 5, 2000) (detailing Court's standard of review for antidumping proceedings).

#### DISCUSSION

##### *I. Commerce's CV Profit Calculation*

###### *A. Background*

During this review, Commerce used CV as the basis for normal value ("NV") "when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 63 Fed. Reg. at 6516. Commerce calculated the profit component of CV using the statutorily preferred methodology contained in 19 U.S.C. § 1677b(e)(2)(A). See *Final Results*, 63 Fed. Reg. at 33,333. The statutorily preferred method requires calculating an amount for profit based on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review . . . in connection with the production and sale of a foreign like product [made] in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A).

In applying the preferred methodology for calculating CV profit, Commerce determined that: (1) "an aggregate calculation that encompasses all foreign like products under consideration for normal value represents a reasonable interpretation of [19 U.S.C. § 1677b(e)(2)(A)]"; and (2) "the use of [such] aggregate data results in a reasonable and practical measure of profit that [it] can apply consistently in each case." *Final Results*, 63 Fed. Reg. at 33,333. In addition, Commerce used all sales "in the ordinary course of trade as the basis for calculating CV profit[.]" that is, it disregarded below-cost sales that were considered to be outside the ordinary course of trade. *Id.* at 33,334.

###### *B. Parties' Contentions*

Barden-FAG argues that Commerce's use of aggregate data encompassing all foreign like products under consideration for NV in calculating CV profit is contrary to 19 U.S.C. § 1677b(e)(2)(A) and to the explicit hierarchy established by 19 U.S.C. § 1677(16) (1994) for selecting "foreign like product" for the CV profit calculation. See Pls.' Br. Supp. Mot. J. Agency R. at 4-11; Pls.' Reply Br. at 2-12. Barden-FAG maintains that if Commerce intends to calculate CV profit on such an aggregate basis, it must do so under the alternative methodology of 19 U.S.C. § 1677b(e)(2)(B)(i), which provides a CV profit calculation that is similar to the one Commerce used, but does not limit the calculation to sales made in the "ordinary course of trade," that is, below-cost sales are not disregarded. See Pls.' Br. Supp. Mot. J.

Agency R. at 10-11. In other words, Barden-FAG asserts that Commerce should include all reported sales in its aggregated CV profit calculation. *See id.* at 2, 10-11.

Commerce responds that it properly calculated CV profit pursuant to 19 U.S.C. § 1677b(e)(2)(A) based on aggregate profit data of all foreign like products under consideration for NV. *See* Def.'s Mem. in Opp'n to Pls.' Mot. J. Agency R. at 5-20. Torrington agrees with Commerce's CV profit calculation under 19 U.S.C. § 1677b(e)(2)(A) and, therefore, maintains it is not necessary to use an alternative methodology under 19 U.S.C. § 1677b(e)(2)(B). *See* Torrington's Resp. to Pls.' Mot. J. Agency R. at 7-8.

### C. Analysis

In *RHP Bearings Ltd. v. United States*, 23 CIT \_\_\_, 83 F. Supp. 2d 1322 (1999), this Court upheld Commerce's CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at \_\_\_, 83 F. Supp. 2d at 1336. Since Barden-FAG's arguments and the methodology used for calculating CV profit in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings* and, therefore, finds that Commerce's CV profit calculation methodology is in accordance with law. Moreover, since (1) 19 U.S.C. § 1677b(e)(2)(A) requires Commerce to use the "actual amount" for profit in connection with the production and sale of a foreign like product in the ordinary course of trade, and (2) 19 U.S.C. § 1677(15) (1994) provides that below-cost sales disregarded under 19 U.S.C. § 1677b(b)(1) (1994) are considered to be outside the ordinary course of trade, the Court finds that Commerce properly excluded below-cost sales from the CV profit calculation.

## II. Commerce's Below-Cost Sales Test

### A. Background

Pursuant to 19 U.S.C. § 1677b(b)(1), whenever Commerce has "reasonable grounds to believe or suspect" that sales of the foreign like product under consideration for the determination of NV have been made at prices which represent less than the cost of production ("COP") of that product, Commerce shall determine whether, in fact, such sales were made at less than the COP. "Reasonable grounds" exist if: (1) a sufficient allegation of below-cost sales was made by an interested party in the antidumping duty investigation or the current administrative review of the applicable antidumping duty order; or (2) Commerce disregarded below-cost sales of a particular exporter or producer from the determination of NV in the most recently completed administrative review. *See* 19 U.S.C. § 1677b(b)(2)(A)(i), (ii).

In this case, after the initiation of this eighth review of AFBs, Commerce determined that it had "reasonable grounds to believe or suspect" that Barden's sales in the home market were below the COP. Commerce based its "reasonable grounds" on the most recently com-

pleted administrative review, that is, the fifth review, where it disregarded certain below-cost sales of Barden. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472, 66,490 (Dec. 17, 1996) (fifth administrative review). Since Commerce assumed it had “reasonable grounds,” it initiated a below-cost sales investigation of Barden’s AFBs on June 20, 1997 by requesting COP information from the company, which Barden provided on September 5, 1997. *See* Def.’s Letter Forwarding Questionnaire to Interested Parties, Def.’s App., Ex. 1. Subsequently, Commerce performed a below-cost sales test in the *Preliminary Results* and found that certain Barden sales were below-cost and thereby disregarded such sales. *See* 63 Fed. Reg. at 6516 (Feb. 9, 1998).

After the publication of the *Preliminary Results* of this review, Commerce found that it inappropriately applied a below-cost sales test regarding Barden’s AFBs in the fifth review. *See Final Results*, 63 Fed. Reg. at 33,333. Commerce, therefore, determined that it did not have “reasonable grounds” under 19 U.S.C. § 1677b(b)(2)(A)(ii) to self-initiate a below-cost sales investigation for this review. *See id.* However, Commerce concluded that since it made this determination after the 120-day deadline under 19 C.F.R. § 353.31(c)(1)(ii) (1997) for an interested party to file a below-cost sales allegation pursuant to 19 U.S.C. § 1677b(b)(2)(A)(i), Commerce would allow Torrington to file such an allegation after Commerce’s normal regulatory deadline. *See id.*

Thus, on April 2, 1998, Commerce solicited from Torrington a below-cost sales allegation regarding Barden’s sales for the eighth review if Torrington believed, “based on information on the record not associated with Barden’s original cost-of-production data, that Barden made below-cost sales during the 1996-1997 review period.” *Commerce’s Letter to Torrington*, Def.’s Pub. App., Ex. 3. In response to Commerce’s solicitation, Torrington submitted a below-cost sales allegation on April 13, 1998. *See Torrington’s Letter to Commerce*, Def.’s Pub. App., Ex. 4. After analyzing Torrington’s allegation, Commerce decided on May 1, 1998 to conduct a below-cost sales investigation, *see Commerce’s Below-Cost Sales Allegation Mem.*, Def.’s Pub. App., Ex. 6, and, accordingly, performed a below-cost sales test of Barden’s home market sales in the *Final Results*, *see* 63 Fed. Reg. at 33,333; *Commerce’s Analysis Mem. for Final Results*, Def.’s Pub. App., Ex. 7 at 3 (June 8, 1998).

#### B. Parties’ Contentions

Barden contends that “it was clearly unlawful and an abuse of discretion for Commerce to accept or consider Torrington’s below-cost sales allegation months after the regulatory filing deadline had expired, and no provision in the regulations permitted Commerce to grant such an extraordinary time extension.” Pls.’ Br. Supp. Mot. J.

Agency R. at 15; *see* Pls.' Reply Br. at 12-15. In particular, Barden notes that regulation 19 C.F.R. § 353.31(c)(1)(ii) states that an allegation of sales below COP must be submitted by an interested party in an administrative review no later than 120 days after the publication date of the notice of initiation of the review. *See* Pls.' Br. Supp. Mot. J. Agency R. at 12. Barden also notes that Commerce will not consider any allegation of sales below the COP that is submitted after this specified deadline. *See id.* (quoting 19 C.F.R. § 353.31(c)(1)). Moreover, Barden points out that if an extension would facilitate the proper administration of the law, then 19 C.F.R. § 353.31(c)(2) allows for an extension in an administrative review not longer than 30 days. *See id.*

Thus, Barden asserts that (1) since in the instant review Commerce published the notice of initiation on June 17, 1997, (2) since 19 C.F.R. § 353.31(c)(1)(ii) required a below-cost sales allegation be submitted 120-days after such notice, that is, October 15, 1997, and (3) because such a 120-day deadline could have extended not longer than 30 days, that is, until November 14, 1997, Commerce was "prohibited" from considering Torrington's below-cost sales allegation submitted on April 13, 1998. *See id.* at 12-13. Barden claims that although it has "been held that non-compliance with a timing directive should not render the agency powerless, this decision has only been reached when the timing directive did not specify the consequences of breaching the deadline." *See id.* at 13. In this instance, however, Barden argues that 19 C.F.R. § 353.31(c)(1) clearly provides that Commerce will not consider any allegation submitted after the applicable deadline and that, therefore, Commerce erred in accepting Torrington's belated below-cost sales allegation. *See id.*

In addition, Barden claims that the failure to meet the deadline for a below-cost sales allegation in this case was not due to Commerce's inaction or negligence; rather, it was due to Torrington's negligence and inaction. *See id.* at 13-14. Barden notes that Torrington was capable of filing an allegation in a timely manner and was clearly on "notice" when this review was initiated that decisions from Commerce and this Court found that "no valid below-cost allegation had ever been filed against Barden." *Id.* at 14. In particular, Barden asserts that Torrington had "notice" from: (1) the final results of the fourth review period of AFBs, where Commerce determined that Torrington's below-cost sales allegation against respondent FAG U.K. Ltd. did not implicate Barden, *see id.* (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews and Revocation in Part of Antidumping Duty Orders*, 60 Fed. Reg. 10,900, 10,928 (Feb. 28, 1995)); and (2) this Court's subsequent decision on November 1, 1996, which upheld Commerce's determination in the fourth review to refuse to conduct a below-cost sales test for Barden because a sufficient allegation had not been made against Barden, *see id.* (citing *FAG U.K. Ltd. v. United States*, 20 CIT 1277, 1291-92, 945 F. Supp. 260, 272 (1996)).



Finally, Barden contends that although 19 C.F.R. § 353.31(b) (1997) specifically provides that Commerce “may request any person to submit factual information at any time during a proceeding[.]” this general provision does not apply to below-cost sales allegations. *See* Pls.’ Br. Supp. Mot. J. Agency R. at 15. Rather, Barden argues that since 19 C.F.R. § 353.31(c) has “a specific limitation on the time extensions permissible for below-cost sales allegations, this provision must take precedence over the general provision allowing the submission of additional information at any time.” *See id.*

Barden requests that the Court instruct Commerce on remand to disregard Torrington’s belated below-cost sales allegation and to recalculate Barden’s company-specific dumping margin without regard to the results of the unlawful below-cost sales test. *See id.* at 3, 12, 15.

Commerce responds that it did not violate its own regulations in accepting Torrington’s below-cost sales allegation. *See* Def.’s Mem. in Opp’n to Pls.’ Mot. J. Agency R. at 25. Specifically, Commerce argues, *inter alia*, that Torrington had no need to file a below-cost sales allegation against Barden within the normal 120-day regulatory deadline in circumstances where Commerce decided to self-initiate a below-cost sales inquiry. *See* Def.’s Mem. in Opp’n to Pls.’ Mot. J. Agency R. at 26-28, 27 n.7. Commerce contends that 19 C.F.R. § 353.31(c)’s deadlines cover only the situation in which an interested party submits an untimely below-cost sales allegation on its own, but do not cover the situation in which an interested party submits the allegation at the request of Commerce. *See id.* at 26-29. Commerce, therefore, asserts that it reasonably “solicited” an allegation from Torrington under 19 C.F.R. § 353.31(b). *See id.* at 29-30. In the alternative, Commerce argues that even if it were deemed to have acted contrary to its own regulations by accepting Torrington’s below-cost sales allegation, Commerce’s act amounted to “harmless error” because Barden has not demonstrated that it was prejudiced by Commerce’s untimely acceptance of Torrington’s allegation. *See id.* at 3, 31.

Torrington agrees with Commerce’s contentions, arguing, *inter alia*, that it was unnecessary for Torrington to file an initial below-cost sales allegation within the regulatory deadline because Commerce had already initiated a below-cost sales investigation. *See* Torrington’s Resp. to Pls.’ Mot. J. Agency R. at 11. In particular, Torrington asserts that any requirement to file a below-cost sales allegation regarding Barden did not arise until after April 2, 1998, that is, when Commerce rescinded its original decision to initiate a below-cost sales inquiry for Barden’s AFBs. *See id.* Therefore, Torrington maintains that since Commerce’s rescission is not covered by 19 C.F.R. § 353.31(c), Commerce reasonably solicited and accepted Torrington’s below-cost sales allegation. *See id.* at 10-11.

### C. Analysis

Under the circumstances of this case, the Court agrees with Barden that Commerce lacked authority to “solicit” such an allegation from

Torrington. In particular, the Court finds that Commerce failed to remain “impartial” in the antidumping proceeding, *see NEC Corp. v. United States*, 151 F.3d 1361, 1371 (1998) (noting that “[t]he right to an impartial decision maker is unquestionably an aspect of procedural due process” in administrative proceedings), that is, Commerce should have avoided specifically “requesting” that Torrington submit a below-cost sales allegation in its rescission letter to Torrington, *see Commerce’s Letter to Torrington*, Def.’s Pub. App., Ex. 3 (Apr. 2, 1998) (requesting a below-cost sales “allegation” from Torrington); Def.’s Mem. in Opp’n to Pls.’ Mot. J. Agency R. at 29-30 (Commerce admitting that it “requested” Torrington to submit a below-cost sales allegation). The Court thus finds that Commerce erred in conducting a below-cost sales test for Barden’s AFBs for this review.

#### CONCLUSION

For the foregoing reasons, the case is remanded to Commerce to disregard Torrington’s below-cost sales allegation and to recalculate Barden’s dumping margin without regard to the results of the below-cost sales test. Commerce’s final determination is affirmed in all other respects.

NICHOLAS TSOUCALAS  
*Senior Judge*

Dated: August 4, 2000  
New York, New York



(Slip Op. 00 - 96)

CAMARGO CORREA METAIS, S.A., PLAINTIFF,  
V. THE UNITED STATES, DEFENDANT, AND  
AMERICAN ALLOYS, INC., GLOBE METALLURGICAL, INC., AMERICAN  
SILICON TECHNOLOGIES (FORMERLY SILICON METALTECH, INC.),  
AND SIMETCO, INC., DEFENDANT-INTERVENORS

Consol. Court No. 91-09-00641

Before: MUSGRAVE, *Judge*

ORDER

Upon consideration of the request of Defendant-Intervenors, Defendant's response, and all other papers and proceedings had herein, it is hereby ORDERED that the matter is remanded to the Department of Commerce for proceedings consistent with the decision of the Court of Appeals for the Federal Circuit in *Camargo Correa Metais, S.A. v. United States*, 200 F.3d 771 (Fed. Cir. 1999), and it is further ORDERED that the Department of Commerce shall have 90 days from the date hereof to file such remand results.

R. KENTON MUSGRAVE  
*Judge*

Dated: August 4, 2000  
New York, NY

(Slip Op. 00-97)

MITSUBISHI HEAVY INDUSTRIES, LTD., AND TOKYO SEISAKUSHO, LTD., PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND GOSS GRAPHICS INC., DEFENDANT, INTERVENOR

Consol. Court No. 96-10-02292

[Plaintiff's motion for reconsideration denied.]

Decided: August 8, 2000

*Steptoe & Johnson LLP* (Anthony J. LaRocca, Richard O. Cunningham, Eric C. Emerson, Gregory S. McCue) for Plaintiff Mitsubishi Heavy Industries, Ltd.; *Perkins Coie LLP* (Yoshihiro Saito, Mark T. Wadsen), for Plaintiff Tokyo Kikai Seisakusho, Ltd.

David W. Ogden, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Velta A. Melnbrensis, Assistant Director, Commercial Litigation Branch, James H. Holl III, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; Robert J. Heilferty, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Wiley, Rein & Fielding (Charles Owen Verrill, Jr., Alan H. Price, John R. Shane, Timothy C. Brightbill) for Defendant-Intervenor.

### MEMORANDUM OPINION AND ORDER

POGUE, *Judge*: Pursuant to USCIT Rule 59, plaintiff Tokyo Kikai Seisakusho, Ltd. ("TKS") moves this Court to reconsider its decision in *Mitsubishi Heavy Industries, Ltd. v. United States*, 24 CIT \_\_, 97 F. Supp. 2d 1203 (2000) ("*Mitsubishi III*"), affirming the U.S. Department of Commerce's ("Commerce") second remand determination in connection with its antidumping duty determination in *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg. 38,139 (Dep't Commerce, July 23, 1996)(final determ.)( "*Japan Final*"), amended by, 61 Fed. Reg. 46,621 (Dep't Commerce, Sept. 4, 1996)(antidumping duty order and amend. to final determ.).

On June 23, 1998, this Court remanded certain aspects of Commerce's determination in *Japan Final*, including the issue TKS here asks us to reconsider: Commerce's "foreign like product" determination under 19 U.S.C. § 1677(16). See *Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT \_\_, 15 F. Supp. 2d 807 (1998) ("*Mitsubishi I*"). Because Commerce again did not adequately explain the basis of its foreign like product determination on remand, we remanded the issue a second time to Commerce for further explanation or reconsideration. See *Mitsubishi Heavy Indus., Ltd. v. United States*, 23 CIT \_\_, 54 F. Supp. 2d 1183, 1197-98 (1999) ("*Mitsubishi II*"). Finally, after reviewing Commerce's explanation of its foreign like product determination in its second remand determination, we affirmed the determination as supported by substantial evidence. See *Mitsubishi III*, 24 CIT at \_\_, 97 F. Supp. 2d at 1209.

Now, however, TKS asks this Court to reconsider its decision in *Mitsubishi III*. TKS argues that this Court has “misapprehended [Commerce’s] position regarding the basis for its ‘foreign like product’ finding[.]” TKS’s Mot. to Alter or Reconsider J. at 6, and, in doing so, has improperly substituted its own judgment in place of Commerce’s, *see id.* at 13.

#### *Motions for Reconsideration*

The grant or denial of a motion for reconsideration under USCIT Rule 59(a) lies within the sound discretion of the court. *See Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT \_\_, \_\_, 19 F. Supp. 2d 1116, 1118 (1998)(citing *St. Paul Fire & Marine Ins. Co. v. United States*, 16 CIT 984, 984, 807 F. Supp. 792, 793 (1992), *aff’d*, 16 F.3d 420 (Fed. Cir. 1993); *Sharp Elecs. Corp. v. United States*, 14 CIT 1, 2, 729 F. Supp. 1354, 1355 (1990)). “The purpose of a rehearing is not to relitigate the case but, rather, to rectify a fundamental or significant flaw in the original proceeding.” *Id.* (citing *Arthur J. Humphreys, Inc. v. United States*, 15 CIT 427, 427, 771 F. Supp. 1239, 1241 (1991), *aff’d and adopted*, 973 F.2d 1554 (Fed. Cir. 1992)). “[A] court’s previous decision will not be disturbed unless it is ‘manifestly inadequate.’” *Id.* (quoting *St. Paul*, 16 CIT at 984, 807 F. Supp. at 793).<sup>1</sup>

#### *Discussion*

In *Japan Final*, Commerce did not explain which of the three statutory foreign like product definitions<sup>2</sup> under 19 U.S.C. § 1677(16)(1994) it relied upon in classifying large newspaper printing presses (“LNPPs”)

<sup>1</sup>TKS fashions its motion for reconsideration as a “motion to alter or amend judgment” under USCIT Rule 59(e). Traditionally, however, this court has entertained motions for reconsideration as motions made pursuant to USCIT Rule 59(a). *See, e.g., NEC Corp. v. Dep’t of Commerce*, 24 CIT \_\_, \_\_, 86 F. Supp. 2d 1281, 1282 (2000); *Asociacion*, 22 CIT at \_\_, 19 F. Supp. 2d at 1118; *Union Camp Corp. v. United States*, 21 CIT 371, 371-72, 963 F. Supp. 1212, 1212-13 (1997); *St. Paul*, 16 CIT at 984, 807 F. Supp. at 793. *But see Apple Computer, Inc. v. United States*, 14 CIT 719, 720, 749 F. Supp. 1142, 1144 (1990)(treating a motion to alter or amend judgment under USCIT Rule 59(e) as a motion for reconsideration). At any rate, this court’s precedent dealing with USCIT Rule 59(a) sets out the proper test for determining whether a motion for reconsideration should be granted. Moreover, the treatment of TKS’s motion as arising under USCIT Rule 59(a) does not place TKS at any procedural disadvantage. *See* Fed. R. App. P. 4(a)(4)(A)(treating the motions to alter or amend judgment and motions for rehearing under the Fed. R. Civ. P. as the same for purposes of the deadline for filing an appeal).

<sup>2</sup>The statute defines “foreign like product” as,

[M]erchandise in the first of the following categories in respect of which a determination . . . can be satisfactorily made:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

- (i) produced in the same country and by the same person as the subject merchandise,
- (ii) like that merchandise in component material or materials and in the purposes for which used, and
- (iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

- (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
- (ii) like that merchandise in the purposes for which used, and
- (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16)(1994).

sold in Japan as foreign like product; therefore, we remanded this issue for Commerce's reconsideration. See *Mitsubishi I*, 22 CIT at \_\_, 15 F. Supp. 2d at 829. In its first remand determination of December 21, 1998, Commerce explained that it had relied upon the definition of foreign like product at § 1677(16)(C). See First Remand Determ. at 17. Commerce did not, however, explain the factual basis for its determination that the LNPPs sold in Japan and the United States could "reasonably be compared" under 19 U.S.C. § 1677(16)(C)(iii). See *Mitsubishi II*, 23 CIT at \_\_, 54 F. Supp. 2d at 1197.

Instead, in its first remand determination, Commerce referred to its twenty percent "difmer" guideline. Under the difmer guideline, if the difmer adjustment to normal value, see 19 U.S.C. § 1677b(a)(6)(C)(ii), exceeds twenty percent, Commerce will not make a finding that the home-market product is reasonably comparable to the exported good, unless it can explain how the comparison is nevertheless reasonable. See *Mitsubishi III*, 24 CIT at \_\_, 97 F. Supp. 2d at 1205-06 (citing Policy Bulletin 92.2 (July 29, 1992)). Based on Commerce's remand discussion, it appeared to the Court that Commerce had found in its investigation of Japanese LNPPs that the difmer adjustment exceeded the twenty percent threshold. See *id.* at \_\_, 97 F. Supp. 2d at 1206. Therefore, because Commerce's first remand determination did not explain the factual basis for its decision that the Japanese and U.S. LNPPs were nevertheless reasonably comparable, we remanded for a second time. See *id.*

In its second remand determination, Commerce clarified that it did not conduct a difmer analysis. See *id.* at \_\_, 97 F. Supp. 2d at 1207 (citing Second Remand Determ. at 1). "Because Commerce did not in fact find that the difmer adjustment exceeded twenty percent, Commerce did not make a presumptive finding that the Japanese and U.S. LNPPs were not reasonably comparable." *Id.* In addition, Commerce finally explained the factual basis for its determination that the home-market and U.S. LNPPs could "reasonably be compared" under § 1677(16)(C)(iii), basing its finding on record evidence that the home-market and U.S. products shared numerous detailed product characteristics. See *id.* at \_\_, 97 F. Supp. 2d at 1208. Because the factual basis for Commerce's determination was supported by substantial evidence, this Court sustained Commerce's second remand determination. See *id.* at \_\_, 97 F. Supp. 2d at 1209.

Moving for reconsideration, TKS now argues that the Court "misapprehended [Commerce's] position regarding the basis for its 'foreign like product' finding." TKS's Mot. to Alter or Reconsider J. at 6. According to TKS, Commerce referred to shared physical characteristics simply as collateral support for the true basis of its decision. See *id.* TKS maintains that the true basis for Commerce's foreign like product finding was its contention that the term "may reasonably be compared" under § 1677(16)(C)(iii) should be flexibly interpreted depending on the statutory context within which the "foreign like product" definition is being applied. See *id.* at 6-7. "Thus," TKS continues, "by asserting that the phrase 'may reasonably be compared' should be

interpreted flexibly, [Commerce] is essentially asserting that the term ‘foreign like product’ has different meanings, depending on the statutory context to which it is applied.” *Id.* at 7.

Nevertheless, despite TKS’s arguments, we remain convinced that the evidence of shared product characteristics served as the primary basis for Commerce’s reasonable comparability finding. In *Mitsubishi II*, we made it clear that Commerce needed to explain the basis for its finding of reasonable comparability. *See* 23 CIT at \_\_, 54 F. Supp. 2d at 1197-98. It is not accurate, however, to assert that Commerce based its conclusion that the Japanese and U.S. LNPPs may reasonably be compared on its argument that the “reasonably comparable” prong of § 1677(16)(C)(iii) may be flexibly interpreted. Rather, in arguing that the phrase “may reasonably be compared” of § 1677(16)(C)(iii) should be construed within the statutory context to which it is being applied, Commerce was merely explaining its legal interpretation of the term. Commerce’s legal interpretation, however, did not answer whether the Japanese and U.S. LNPPs were reasonably comparable. Instead, Commerce’s shared-product-characteristic explanation provided the only factual basis for its determination. Therefore, we concluded that the basis for Commerce’s reasonable comparability finding was its reliance on the evidence of shared product characteristics. *See Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)(The Court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”).

We recognize that Commerce dedicated a good portion of its second remand determination to explaining its flexible construction of § 1677(16)(C)(iii)’s “may reasonably be compared” requirement. *See* Second Remand Determin. at 5-9. Nevertheless, it was apparent that, in including this discussion, Commerce was responding to our focus on the difmer adjustment in *Mitsubishi II*, 23 CIT at \_\_, 54 F. Supp. 2d at 1195-98. In its second remand determination, Commerce was in essence explaining that the twenty percent difmer guideline was not relevant to the CV profit calculation under 19 U.S.C. § 1677b(e)(2)(A). As we stated in *Mitsubishi III*, however, “we recognize[d] that Commerce’s practice [was] to apply the twenty percent difmer guideline solely to determine whether price-to-price comparisons [(i.e., normal value to U.S. price)] [were] feasible.” 24 CIT at \_\_, 97 F. Supp. 2d at 1207.

Nevertheless, under Commerce’s difmer practice, a finding that the difmer adjustment to normal value exceeds twenty percent is a presumptive finding that the products may not reasonably be compared under § 1677(16)(C)(iii). *See* Policy Bulletin 92.2 (July 29, 1992). Based on Commerce’s discussion of the difmer guideline in its first remand determination, it appeared that Commerce had found that the difmer adjustment exceeded the twenty percent threshold; therefore, it appeared that Commerce had made a presumptive finding that the Japanese and U.S. LNPPs were not reasonably comparable. *See Mitsubishi III*, 24 CIT at \_\_, 97 F. Supp. 2d at 1206. Thus, in *Mitsubishi II*, we were concerned that, for the purpose of determining whether it was

feasible to compare the home-market price (normal value) to the U.S. price in determining the dumping margin, Commerce had found that no foreign like product existed. Such a finding, then, would have been inconsistent with Commerce's calculation of CV profit under § 1677b(e)(2)(A) based on sales of a foreign like product.

As Commerce clarified in its second remand determination, however, it did not in fact conduct a difmer analysis in its investigation of Japanese LNPPs. See Second Remand Determin. at 1. Accordingly, Commerce did not make a finding that no foreign like product was available, and its decision to base CV profit on sales of a foreign like product under § 1677b(e)(2)(A) was not necessarily inconsistent with its decision not to make price-to-price comparisons.

Thus, in *Mitsubishi III*, we declined "to decide whether it [was] permissible to interpret the language 'may reasonably be compared' differently depending on which specific provision of the antidumping statute is implicated." 24 CIT at \_\_\_, 97 F. Supp. 2d at 1207. While we expressed concern with such an interpretation of § 1677(16)(C)(iii), it was apparent that Commerce had not in fact applied the reasonable comparability prong inconsistently in its investigation of Japanese LNPPs. Therefore, the issue was not directly before us.

TKS further asserts, however, that Commerce's reference to shared product characteristics for its finding of reasonable comparability was limited to the CV profit context. *See* TKS's Mot. to Alter or Reconsider J. at 10. According to TKS, "[i]n any other statutory context, such as home market viability or price-to-price comparisons, [Commerce] would provide a different rationale for its foreign like product finding . . . ." *Id.* Because "[t]he Court has not stated whether [Commerce's] determination is appropriate within the limited context of calculating CV profit[.]" TKS continues, "the Court has determined that shared physical characteristics support a foreign like product finding in *all* statutory contexts[.]" thereby misconstruing Commerce's position. *Id.* at 11. "As a result," TKS concludes, "the Court should reconsider its judgment and instead decide whether [Commerce's] flexible interpretation of 'foreign like product' depending on the statutory context is" permissible, because that issue is squarely before the Court. *Id.*

TKS bases its argument—that Commerce's reference to shared product characteristics for its finding of reasonable comparability was limited to the CV profit context—on an isolated sentence from Commerce's second remand determination:

Finally, *for purposes of calculating CV profit*, we determine that TKS's home market LNPP may reasonably be compared to its sales of LNPP in the United States based on evidence that LNPP in both markets share detailed product characteristics, even if the custom-made combination of precise specifications makes price-to-price comparisons impracticable.



Second Remand Determ. at 2 (emphasis added).

It is clear to the Court, however, that, in this case, the shared product characteristics formed the basis of Commerce's foreign like product determination in all statutory contexts. Commerce never asserted that a foreign like product of Japanese LNPPs only existed in the context of the CV profit calculation. Rather, Commerce determined that a foreign like product existed regardless of statutory context. See *Japan Final* at 38,146-147. For example, in declining to compare normal value to the U.S. price in calculating the dumping margin, Commerce stated, "The fact that it was not practicable to compare specific models of LNPP is not the same as saying that home market LNPP may not reasonably be compared with the subject merchandise (LNPP)." First Remand Determ. at 17. Thus, Commerce never found that Japanese and U.S. LNPPs were reasonably comparable under § 1677(16)(C)(iii) in some statutory contexts but not others. Because there was no indication that Commerce had applied the reasonable comparability prong inconsistently in this case, we appropriately declined to decide whether Commerce's flexible interpretation of "may reasonably be compared" was permissible.

Having reviewed TKS's arguments, we conclude that we did not misapprehend Commerce's position with regard to its foreign like product determination. Accordingly, we did not substitute our own judgment for that of Commerce's foreign like product determination in *Mitsubishi III*. TKS's motion for reconsideration is denied. An order will be entered accordingly.

Donald C. Pogue  
*Judge*

Dated: August 8, 2000  
New York, New York

(Slip Op. 00-98)

FUJITSU GENERAL AMERICA, INC., SUCCESSOR-IN-INTEREST TO TEKNIKA, ELECTRONICS CORP., PLAINTIFF, V. UNITED STATES DEPENDENT

Consol. Ct. No. 98-08-02748

[Plaintiff's motion for summary judgment denied; Defendant's cross-motion for summary judgment granted.]

Decided: August 15, 2000

*Greenberg Traurig LLP, (Brian S. Goldstein) for Plaintiff.**David W. Ogden, Assistant Attorney General, John J. Mahon, Assistant Branch Director, International Trade Field Office, James A. Curley, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; Chi S. Choy, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel; Melanie A. Frank, Office of Assistant Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.***OPINION**

POGUE, *Judge*: Plaintiff Fujitsu General America, Inc. ("Fujitsu") moves for summary judgment pursuant to USCIT Rule 56.<sup>1</sup> Party briefs submitted under Court No. 98-08-02748 will be marked "I," and briefs submitted under Court No. 98-09-02900 will be marked "II." For instance, we will cite to Fujitsu's memorandum of law in support of its motion for summary judgment filed under Court No. 98-08-02748 as "Pl.'s Mem. in Supp. of Mot. SJ I," and we will cite to Fujitsu's memorandum of law in support of its motion for summary judgment filed under Court No. 98-09-02900 as "Pl.'s Mem. in Supp. of Mot. SJ II." Specifically, Fujitsu moves this Court to order the U.S. Customs Service ("Customs") to refund to Fujitsu all antidumping duties and interest assessed by Customs on certain of Fujitsu's entries upon liquidation.<sup>2</sup> Fujitsu claims that it is entitled to an antidumping duty refund because the entries in issue were "deemed liquidated," or liquidated by operation of law, not at the rate assessed by Customs, but "at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record" pursuant to 19 U.S.C. § 1504(d). In the alternative, Fujitsu asserts that, if the entries were not deemed liquidated, Customs should not have assessed interest. In turn, if Customs properly assessed interest on the antidumping duty payments, Fujitsu claims that Customs should have charged simple, rather than compound, interest.

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<sup>1</sup>This matter originated as two separate court actions, No. 98-08-02748 and No. 98-09-02900, brought by Fujitsu. Because the two actions shared the same legal issues as well as the same basic circumstances, however, the Court, with the parties' approval, *sua sponte* consolidated the actions.

<sup>2</sup>"Liquidation" is "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1 (1997).

Defendant, the United States, cross-moves for summary judgment under USCIT Rule 56, contending that Customs properly liquidated Fujitsu's entries at the antidumping duty rate calculated by the U.S. Department of Commerce ("Commerce") and properly charged interest at the compound rate.

#### BACKGROUND

The merchandise in issue consists of televisions from Japan manufactured by Fujitsu General Limited (formerly known as General Corporation) and imported into the United States by Teknika Electronics Corp.<sup>3</sup>

Imports of televisions from Japan are subject to a 1971 antidumping duty finding by the Treasury Department under the Antidumping Act, 1921, 19 U.S.C. §§ 160-173 (1970). See *Television Receiving Sets, Monochrome and Color, From Japan*, 36 Fed. Reg. 4,597 (Dep't Treas., Mar. 10, 1971)(antidumping finding). In 1980, the functions of administering the antidumping law were transferred from the Secretary of the Treasury to the Secretary of Commerce.<sup>4</sup> Because Treasury's finding covering imports of Japanese televisions remained in effect on January 1, 1980, the effective date of the Trade Agreements Act of 1979, the amount of duties imposed under the finding became subject to periodic reviews administered by Commerce pursuant to 19 U.S.C. § 1675(a).

Under the administrative review scheme,

At least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order under [19 U.S.C. § 1673e] or a finding under the Antidumping Act, 1921, . . . [Commerce] . . . shall . . . review, and determine . . . the amount of any antidumping duty, and . . . shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed [and] estimated duty to be deposited . . .

19 U.S.C. § 1675(a)(1994).<sup>5</sup> Thus, upon completion of an administrative review and liquidation, antidumping duties are assessed on the entries of imports covered by the review period, and cash deposits of estimated antidumping duties are collected for all future entries.

On February 11, 1991, Commerce published the final results of an administrative review that covered, for entries of Fujitsu General Limited, the periods March 1, 1986, through February 28, 1987; March 1,

<sup>3</sup>Plaintiff Fujitsu is the successor-in-interest to Teknika Electronics Corp. For the sake of clarity, the Court will hereafter simply refer to Fujitsu as if it were the actual importer.

<sup>4</sup>The Trade Agreements Act of 1979 repealed the Antidumping Act, 1921, and enacted a new antidumping law as part of Title VII of the Tariff Act of 1930. See Pub. L. 96-39, Title I, §§ 101, 106(a), 93 Stat. 150-189, 193 (1979). Administration of the law was simultaneously transferred from Treasury to Commerce.

<sup>5</sup>Although the administrative reviews applicable to this case were conducted under prior versions of 19 U.S.C. § 1675, the relevant language has essentially remained the same.

1987, through February 29, 1988; and March 1, 1989, through February 28, 1990. See *Television Receivers, Monochrome and Color, from Japan*, 56 Fed. Reg. 5,392 (Dep't Commerce, Feb. 11, 1991)(final results admin. review)(“*Final Results of February 11, 1991*”). In this review, Commerce calculated a 35.40% dumping margin for Fujitsu General Limited. See *id.* at 5,401.

Pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii), Fujitsu General Limited brought suit in the Court of International Trade (“CIT”), challenging the antidumping duty rate found by Commerce in the *Final Results of February 11, 1991*. At the outset of the litigation, the CIT ordered a preliminary injunction pursuant to 19 U.S.C. § 1516a(c)(2), which enjoined liquidation of Fujitsu General Limited televisions entered from March 20, 1986, through March 11, 1988 (the “subject entries”). Thus, the court suspended the liquidation of the subject entries of televisions at the antidumping rate determined by Commerce in the *Final Results of February 11, 1991*.

On April 27, 1993, Commerce filed a motion with the court requesting that the case be remanded with respect to seven issues raised by Fujitsu General Limited. The court granted Commerce’s motion. Subsequently, on March 28, 1994, Commerce filed its remand determination with the court. On remand, Commerce reduced the antidumping margin it had previously found in the *Final Results of February 11, 1991* to 26.17%. On March 14, 1995, the CIT affirmed Commerce’s *Final Results of February 11, 1991*, as modified by Commerce’s remand determination (“*Modified Final Results of February 11, 1991*”). See *Fujitsu General Ltd. v. United States*, 19 CIT 359, 883 F. Supp. 728 (1995). Following appeal, the Federal Circuit affirmed the CIT’s decision on July 3, 1996, see *Fujitsu General Ltd. v. United States*, 88 F.3d 1034 (Fed. Cir. 1996), and issued its mandate on August 26, 1996.

On September 16, 1997, Commerce published notice of the Federal Circuit’s July 3, 1996, decision affirming Commerce’s *Modified Final Results of February 11, 1991*. *Television Receivers, Monochrome and Color, From Japan*, 62 Fed. Reg. 48,592 (Dep’t Commerce, Sept. 16, 1997)(notice of final court decision and am. final results admin. review). On September 26, 1997, Commerce sent liquidation instructions to Customs via e-mail. See *Liquidation Instructions for Television Receivers, Monochrome and Color, from Japan Manufactured and / or Exported by Fujitsu General Limited for the Periods March 1, 1986 through February 28, 1997; March 1, 1987 through February 29, 1988; and March 1, 1989 through February 28, 1990 (A-588-015)* (Dep’t Commerce, Sept. 26, 1997)(“Liquidation Instructions”)(attached to Def.’s Reply Br. to Pl.’s Opp’n to Def.’s Cross-Mot. for SJ II (“Def.’s Reply Br. II”)). Subsequently, during November 1997, December 1997, and February 1998, Customs liquidated the subject entries.

On February 11, 1998, Fujitsu filed Protest No. 2704-98-100059 with Customs pursuant to 19 U.S.C. § 1514 (1994), against Customs’ liquidations of subject entries on November 14, 1997, and December 5,

1997. *See* Protest No. 2704-98-100059 (Pl.'s Mem. in Supp. of Mot. SJ I, Ex. 1). Fujitsu's protest challenged Customs' assessment of interest on the subject entries, and alternatively, Customs' assessment of interest at a compound rate. *See id.* Customs denied Fujitsu's protest on March 11, 1998. *See* Pl.'s Mem. in Supp. of Mot. SJ I, Ex. 2. On April 15, 1998, Fujitsu sent a letter to Customs arguing that the entries listed in Protest No. 2704-98-100059 "must be deemed liquidated by operation of law at the rate and amount of antidumping duties asserted at the time of entry by the importer of record, *i.e.*, zero antidumping duties." Pl.'s April 15, 1998, Letter to Customs (Pl.'s Mem. in Supp. of Mot. SJ I, Ex. 3). By letter of June 8, 1998, Customs acknowledged receipt of Fujitsu's deemed liquidation argument, but declined to reconsider its denial of Protest No. 2704-98-100059. *See* Customs' June 8, 1998, Letter to Pl. (Pl.'s Mem. in Supp. of Mot. SJ I, Ex. 4).

Also on February 11, 1998, Fujitsu filed Protest No. 3001-98-100026 with Customs, against Customs' liquidations of entries on November 28, 1997. *See* Protest No. 3001-98-100026 (Pl.'s Mem. in Supp. of Mot. SJ II, Ex. 4). As with Protest No. 2704-98-100059, this protest challenged Customs' assessment of interest on the subject entries, and alternatively, Customs' assessment of interest at a compound rate. *See id.* On March 30, 1998, Fujitsu filed with Customs an additional claim to supplement Protest No. 3001-98-100026, again arguing that Customs' assessment of antidumping duty principal on the entries liquidated on November 28, 1997, was unlawful because these entries were deemed liquidated by operation of law at the rate and amount of antidumping duties asserted at the time of entry by the importer of record. *See* Pl.'s Mar. 30, 1998, Letter to Customs (Pl.'s Mem. in Supp. of Mot. SJ II, Ex. 5). On April 22, 1998, Customs denied Fujitsu's protest. *See* Pl.'s Mem. in Supp. of Mot. SJ II, Ex. 6.

Finally, Fujitsu filed Protest No. 5301-98-100053 with Customs on March 24, 1998, against Customs' liquidation of entry 86-222766-5 on February 27, 1998. *See* Protest No. 5301-98-100053 (Pl.'s Mem. in Supp. of Mot. SJ II, Ex. 1). As with the others, this protest challenged Customs' assessment of interest on the subject entries, and alternatively, Customs' assessment of interest at a compound rate. *See id.* On April 1, 1998, Fujitsu again submitted a supplemental deemed liquidation claim. *See* Pl.'s Apr. 1, 1998, Letter to Customs (Pl.'s Mem. in Supp. of Mot. SJ II, Ex. 2). On April 10, 1998, Customs denied Protest No. 5301-98-100053. *See* Pl.'s Mem. in Supp. of Mot. SJ II, Ex. 3.

Subsequently, Fujitsu filed two actions in this Court addressing the entries covered by the above protests. Now, in reviewing Fujitsu's and Defendant's cross-motions for summary judgment, we are presented with the following legal issues: (1) whether the Court has jurisdiction to decide Fujitsu's deemed liquidation claim; (2) if so, whether Fujitsu's entries were deemed liquidated; (3) if Fujitsu's entries were not deemed liquidated, whether Customs properly assessed interest

thereon even though no cash deposits of estimated antidumping duties were required; and (4) if the assessment of interest was proper, whether Customs properly assessed interest at the compound rate.

#### STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” USCIT Rule 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Here, there are no genuine issues of material fact. The issues to be resolved are legal in nature, and therefore, summary judgment is appropriate. *See* USCIT Rule 56(c).

#### DISCUSSION

*I. Does the Court have jurisdiction to hear Fujitsu’s deemed liquidation claim?*

Fujitsu argues,

Although [Commerce] correctly calculated the antidumping duty principal, Customs’ assessment of the antidumping duty principal for the subject entries is unlawful. The entries must be deemed liquidated by operation of law at the rate and amount of antidumping duties asserted at the time of entry by the importer of record, *i.e.*, zero antidumping duties pursuant to 19 U.S.C. § 1504(d)(1994).

Pl.’s Mem. in Supp. of Mot. SJ II at 7-8.

The deemed liquidation provision, 19 U.S.C. § 1504(d)(1988 & Supp. V 1993), states,

When a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.<sup>6</sup> The underlined portion constitutes the amendment. The amendment is only applicable to administrative reviews initiated after January 1, 1995.

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<sup>6</sup>Pub. L. 103-465, Title II, § 220(c)(2), 108 Stat. 4865 (1994), amended the first sentence of 19 U.S.C. § 1504(d) to state,

*Except as provided in section 1675(a)(3) of this title*, when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry.



Because, here, Commerce completed the subject administrative reviews on February 11, 1991, the amendment does not apply in this case. Therefore, the Court cites to the prior version of 19 U.S.C. § 1504(d), which became effective on December 8, 1993, and may be applied to administrative reviews commenced before that date.

Here, liquidation of the subject entries was first suspended as required by statute, 19 U.S.C. § 1675(a), as Commerce conducted the administrative reviews it would eventually issue in the *Final Results of February 11, 1991*. See *United States v. Jick (USA) Indus. Corp.*, 22 CIT \_\_, \_\_, 27 F. Supp. 2d 199, 200-01 (1998) (“To establish harmonious interpretations of section 1675(a) and section 1504(d), this Court has held that because of 1675(a), the suspension of liquidation during the annual review is required by statute.”)(citing *Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984); *American Permac, Inc. v. United States*, 10 CIT 535, 538-39, 642 F. Supp. 1187, 1190-91 (1986)).

Moreover, the liquidation of the subject entries was enjoined by court order under 19 U.S.C. § 1516a(c)(2) when Fujitsu General Limited challenged Commerce’s *Final Results of February 11, 1991* in the CIT. The Federal Circuit issued a decision affirming the *Modified Final Results of February 11, 1991* on July 3, 1996. See *Fujitsu General Ltd.*, 88 F.3d 1034.

On September 16, 1997, Commerce published notice of the Federal Circuit’s July 3, 1996, decision affirming Commerce’s *Modified Final Results of February 11, 1991*. Commerce stated, “As there is now a final and conclusive court decision in this action, we are amending our final results of review in this matter and we will subsequently instruct the U.S. Customs service to liquidate entries subject to this review.” *Television Receivers, Monochrome and Color, From Japan*, 62 Fed. Reg. 48,592 (Dep’t Commerce, Sept. 16, 1997)(notice of final court decision and am. final results admin. review). On September 26, 1997, Commerce sent its liquidation instructions to Customs via e-mail. See Liquidation Instructions. The instructions stated, “These instructions constitute the immediate lifting of suspension of liquidation of entry summaries for the merchandise and periods listed . . . [,]” and directed Customs to assess an antidumping rate of 26.17% *ad valorem* on the subject entries. *Id.*

Fujitsu argues that, for the purposes of § 1504(d), Customs (as well as Commerce) had notice that the court-ordered suspension of liquidation was removed on July 3, 1996, the date the Federal Circuit entered its judgment in *Fujitsu General Ltd.*, 88 F.3d 1034. See Pl.’s Mem. in Supp. of Mot. SJ II at 10. Because Customs did not liquidate the subject entries until over a year later, Fujitsu maintains, “well after the six months permitted by 19 U.S.C. § 1504(d), the subject entries must be deemed liquidated by operation of law . . . .” *Id.*

In raising its deemed liquidation argument, Fujitsu seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1581(i)(1994),<sup>7</sup> 28 U.S.C. § 1581(i), the residual jurisdiction provision. *See id.* at 7 n.1. "Section 1581(i) jurisdiction[, however,] may not be invoked when jurisdiction under another subsection of § 1581 *is or could have been available*, unless the remedy provided under that other subsection would be manifestly inadequate." *Norcal / Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992)(quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)). Defendant submits that Fujitsu could have invoked this Court's jurisdiction under subsection (a) of § 1581 to raise its deemed liquidation claim; therefore, Fujitsu cannot invoke this Court's residual jurisdiction under § 1581(i). *See* Def.'s Opp'n to Pl.'s Mot. SJ II at 5-14. Thus, we must first assess whether Fujitsu could have obtained jurisdiction for its deemed liquidation argument under § 1581(a) before determining whether Fujitsu may invoke jurisdiction under § 1581(i).

Under 28 U.S.C. § 1581(a), the CIT has exclusive jurisdiction of any civil action commenced to contest the denial by Customs of a protest pursuant to 19 U.S.C. § 1515 (1994). Importers protest Customs decisions under the procedures outlined in 19 U.S.C. § 1514. Under § 1514(a), a protest may only be filed against certain enumerated Customs "decisions."<sup>8</sup> 19 U.S.C. § 1514(a). Fujitsu argues that its deemed liquidation claim does not involve a protestable decision of Customs, and therefore, the Court has jurisdiction to review the issue under 28 U.S.C. § 1581(i). *See* Pl.'s Mem. in Supp. of Mot. SJ II at 7 n.1.

The Federal Circuit has explained that, "[t]ypically, 'decisions' of Customs [under § 1514(a)] are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty." *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360

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<sup>7</sup>That provision states,

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for-

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

...<sup>8</sup>The provision specifies the following Customs' decisions, "including the legality of all orders and findings entering into the same," that may be protested:

- (1) the appraised value of merchandise;
- (2) the classification and rate and amount of duties chargeable;
- (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
- (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
- (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
- (6) the refusal to pay a claim for drawback; or
- (7) the refusal to reliquidate an entry under section 1520(c) of this title . . . .

(1998). Customs does not make a decision in order to effect a deemed liquidation. Rather, a deemed liquidation under 19 U.S.C. § 1504(d) occurs by operation of law. Therefore, where an importer believes its entries were deemed liquidated under § 1504(d), and Customs has not actively liquidated the entries anew, the importer's only remedy, at that point, is to seek a declaratory judgment from the CIT confirming that there was a deemed liquidation under 28 U.S.C. § 1581(i).

Here, however, notwithstanding Fujitsu's contention that the subject entries were deemed liquidated, Customs actively liquidated the entries in November/December 1997 and February 1998. A Customs decision to liquidate certain entries anew after the entries had already been deemed liquidated is a protestable decision under 19 U.S.C. § 1514(a)(5). *See Pagoda Trading Corp. v. United States*, 804 F.2d 665, 668 (Fed. Cir. 1986). Therefore, once Customs purportedly liquidated the subject entries, Fujitsu could no longer invoke the CIT's jurisdiction under 28 U.S.C. § 1581(i), because Fujitsu was then afforded an adequate remedy under § 1581(a).

In fact, Fujitsu did attempt to raise its deemed liquidation claim before Customs through the protest procedures of 19 U.S.C. § 1514. Moreover, Fujitsu claims that it raised its deemed liquidation argument within the time limits prescribed by § 1514(c)(3). *See* Pl.'s Mem. in Supp. of Mot. SJ II at 7 n.1. If so, it would be unnecessary to address whether Fujitsu may invoke this Court's jurisdiction under 28 U.S.C. § 1581(i) to review this issue, because jurisdiction under § 1581(a) would be available. Defendant, however, asserts that, for Protest No. 2704-98-100059 and Protest No. 3001-98-100026, Fujitsu did not submit its deemed liquidation argument to Customs within the time allowed by § 1514(c), and therefore, the Court lacks jurisdiction under 28 U.S.C. § 1581(a). *See* Def.'s Opp'n to Pl.'s Mot. SJ II at 5.

Defendant concedes, however, that Plaintiff Fujitsu properly raised the deemed liquidation issue for entry no. 86-222766-5 within a timely amendment to Protest No. 5301-98-100053. *See* Def.'s Opp'n to Pl.'s Mot. SJ II at 14. Therefore, Defendant believes the Court does have jurisdiction under § 1581(a) to hear Fujitsu's deemed liquidation argument as to this entry. *See id.*

Therefore, we separately address below whether the Court has jurisdiction over (1) the entries covered by protests 2704-98-100059 and 3001-98-100026 and (2) the entry covered by protest 5301-98-100053.

#### A. *Protests 2704-98-100059 and 3001-98-100026*

If Fujitsu filed its deemed liquidation argument within the time limits prescribed by 19 U.S.C. § 1514(c), then this Court would have jurisdiction under 28 U.S.C. § 1581(a) to review the issue in connection with the entries covered by protests 2704-98-100059 and 3001-98-100026. Section 1514(c)(3) provides that a protest of a liquidation decision must be filed with Customs within ninety days after notice of liquidation. Customs affords notice of liquidations by posting bulletin notices at the customhouse at the port of entry. *See* 19 C.F.R. § 159.9(b)(1997).

“[Such] bulletin notices supply sufficient notice and thus trigger the ninety-day period for protests.” *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995).

Fujitsu filed Protest No. 2704-98-100059 on February 11, 1998, challenging Customs’ assessment of interest on the subject entries liquidated on November 14, 1997, and December 5, 1997. *See* Protest No. 2704-98-100059 (Pl.’s Mem. in Supp. of Mot. SJ I, Ex. 1). On March 11, 1998, Customs denied Fujitsu’s protest. *See* Pl.’s Mem. in Supp. of Mot. SJ I, Ex. 2. On April 15, 1998, Fujitsu sent a letter supplementing Protest No. 2704-98-100059 to Customs asserting its argument that the subject entries were deemed liquidated by operation of law without antidumping duties. *See* Pl.’s April 15, 1998, Letter to Customs (Pl.’s Mem. in Supp. of Mot. SJ I, Ex. 3). Because Fujitsu filed this letter with Customs well after ninety days of notice of the liquidations, the letter did not constitute a timely protest under § 1514(c)(3).

In addition, Fujitsu filed Protest No. 3001-98-100026 on February 11, 1998, challenging Customs’ assessment of interest on the subject entries liquidated on November 28, 1997. *See* Protest No. 3001-98-100026 (Pl.’s Mem. in Supp. of Mot. SJ II, Ex. 4). On March 30, 1998, Fujitsu filed its deemed liquidation claim to supplement this protest. *See* Pl.’s Mar. 30, 1998, Letter to Customs (Pl.’s Mem. in Supp. of Mot. SJ II, Ex. 5). Because Fujitsu did not file the deemed liquidation claim with Customs within ninety days of notice of the liquidations, this claim also did not constitute a timely protest under § 1514(c)(3).

Thus, Fujitsu’s deemed liquidation claim, for the entries covered by both the 2704-98-100059 and 3001-98-100026 protests, was not a timely protest under § 1514(c)(3). In addition, Fujitsu’s deemed liquidation claim for these entries was not timely as an “amendment” or “new ground” under § 1514(c)(1).

Regarding amendments to protests, Section 1514(c)(1) states,

A protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section.

*See also* 19 C.F.R. § 174.14(a)(1997)(“The amendment may assert additional claims pertaining to the administrative decision which is the subject of the protest, or may challenge an additional administrative decision relating to the same category of merchandise which is the subject of the protest.”).

Here, Fujitsu’s original protests, No. 2704-98-100059 and No. 3001-98-100026, challenged Customs’ assessment of interest on the subject entries liquidated by Customs on November 14 and 28, 1997, and December 5, 1997. Customs’ assessment of interest is a protestable decision under § 1514(a)(3), which covers “all charges or exactions.” *See*

*Castelazo & Assoc. v. United States*, 126 F.3d 1460, 1462 (Fed. Cir. 1997)(citing *New Zealand Lamb Co., Inc. v. United States*, 40 F.3d 377, 382 (Fed. Cir. 1994)). Meanwhile, Fujitsu's deemed liquidation claim, protestable under § 1514(a)(5), challenges a Customs' decision separate from the assessment of interest. *See Castelazo*, 126 F.3d at 1462-63 ("Under the statute's structure and language, as well as this court's precedent, Customs' decisions on charges or exactions, such as assessed interest, are independent of its decisions on liquidation or reliquidation [for the purposes of 19 U.S.C. § 1514].")(citing *New Zealand Lamb*, 40 F.3d at 382).<sup>9</sup>

If timely under § 1514(c)(1), Fujitsu's deemed liquidation claim would qualify as an amendment to protests 2704-98-100059 and 3001-98-100026. Fujitsu did not, however, submit its deemed liquidation claim to Customs prior to the expiration of time allowed for filing such an amendment, i.e., not within ninety days from notice of the liquidations. *See* 19 U.S.C. § 1514(c)(1), (3). Thus, Fujitsu's deemed liquidation claim was not timely under § 1514(c)(1) as an amendment to either protest 2704-98-100059 or 3001-98-100026.

The time frame for the raising of a "new ground" is longer than that allowed for an amendment. *See* 19 U.S.C. § 1514(c)(1) ("New grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration in connection with the review of such protest . . . at any time prior to the disposition of the protest . . . .") Unlike an amendment, however, a new ground is an additional claim challenging a Customs decision under § 1514(a) that an importer already challenged via a timely protest. *See id.*; *see also* 19 C.F.R. § 174.28 (1997)("[A] reviewing officer may consider alternative claims and additional grounds or arguments submitted in writing by the protesting party *with respect to any decision which is the subject of a valid protest* at any time prior to disposition of the protest.")(emphasis added). Thus, Fujitsu's deemed liquidation claim does not constitute a new ground, because, as noted above, deemed liquidation is a protestable decision separate from the assessment of interest under § 1514(a). *See Castelazo*, 126 F.3d at 1462-63; *New Zealand*, 40 F.3d at 382.<sup>10</sup>

Therefore, Fujitsu's deemed liquidation claim, submitted to supplement both protests 2704-98-100059 and 3001-98-100026, was not timely under 19 U.S.C. § 1514(c). Because the deemed liquidation claim was

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<sup>9</sup>Here, for instance, Fujitsu's interest argument challenges Customs' decision to assess interest under 19 U.S.C. § 1677g (1994) on entries for which Fujitsu did not have to actually make cash deposits. Meanwhile, Fujitsu's deemed liquidation argument seeks to void Customs' liquidation of the subject entries entirely on the ground that the entries had already been liquidated by operation of law under 19 U.S.C. § 1504(d). Stated differently, Fujitsu's deemed liquidation argument challenges Customs' decision as to the timing of the liquidation. Accordingly, Fujitsu challenges two separate decisions of Customs for the purposes of 19 U.S.C. § 1514(a). *Cf. New Zealand Lamb*, 40 F.3d at 381 (rejecting the argument that, "by operation of [19 U.S.C.] § 1677g, the liquidations for increased countervailing duties amounted to assessments of interest . . . .").

<sup>10</sup>Moreover, it is clear that Fujitsu's deemed liquidation argument submitted to supplement Protest No. 2704-98-100059 would not be timely as a new ground under any circumstance, because it was submitted after Customs' denial of the protest. *See* 19 U.S.C. § 1514(c)(1); Protest No. 2704-98-100059 (Pl.'s Mem. in Supp. of Mot. SJ I, Ex. 1); Pl.'s Mem. in Supp. of Mot. SJ I, Ex. 2).



not timely under § 1514(c), this Court lacks jurisdiction to review the issue under 28 U.S.C. § 1581(a) for the entries covered by these protests. Moreover, for the purposes of invoking this Court's residual jurisdiction under § 1581(i), jurisdiction under § 1581(a) is not inadequate simply because an importer failed to meet the protest deadline under 19 U.S.C. § 1514(c). See *Juice Farms*, 68 F.3d at 1346. Therefore, because Fujitsu could have invoked this Court's jurisdiction under 28 U.S.C. § 1581(a), and that avenue was not "manifestly inadequate," this Court does not have jurisdiction to review the deemed liquidation claim under § 1581(i). See *Miller*, 824 F.2d at 963.

Despite the well-established rule articulated by the Federal Circuit in *Miller*, however, Fujitsu argues that this Court has jurisdiction under § 1581(i) to review the deemed liquidation claim—for the entries covered by protests 2704-98-100059 and 3001-98-100026—based on the Federal Circuit's holding in *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550 (Fed. Cir. 1997). See Pl.'s Mem. in Supp. Mot. SJ II at 5-7; Pl.'s Opp'n to Def.'s Cross-Mot. SJ II at 6-7.

Fujitsu argues that the Federal Circuit's decision in *Cherry Hill* instructs that Fujitsu did not have to file a protest under 19 U.S.C. § 1514(a) in order to challenge the validity of Customs' purported liquidations in court on the ground that the subject entries had already been liquidated by operation of law. See Pl.'s Mem. in Supp. of Mot. SJ II at 6. Because a § 1514(a) protest was unnecessary, Fujitsu asserts that the Court has jurisdiction to review its deemed liquidation claim under 28 U.S.C. § 1581(i). See Pl.'s Mem. in Supp. of Mot. SJ II at 3, 5.

*Cherry Hill* does not, however, extend as broadly as Fujitsu would have it. *Cherry Hill* did not address the issue of whether an importer may invoke the CIT's jurisdiction under 28 U.S.C. § 1581(i) to raise the issue of deemed liquidation in order to invalidate a subsequent liquidation by Customs. Rather, *Cherry Hill* involved an enforcement action brought by the government for the recovery of customs duties. See *United States v. Cherry Hill Textiles, Inc.*, 19 CIT 792, 792-93, 888 F. Supp. 1202, 1204 (1995). As such, the importer, Cherry Hill Textiles, Inc., and its surety, International Cargo & Surety Insurance Company ("IC&S"), were defendants, and jurisdiction of the CIT was predicated on 28 U.S.C. § 1582(2) & (3). See *id.* at 793, 888 F. Supp. at 1204. IC&S sought to raise as an affirmative defense that the importer was not required to pay the duties on the ground that Customs' purported liquidation had already been deemed liquidated at a duty-free rate under 19 U.S.C. § 1504(a). See *id.* The CIT held that, because IC&S did not protest Customs' liquidation through the procedures prescribed by 19 U.S.C. § 1514, IC&S had waived the opportunity to raise deemed liquidation as an affirmative defense. See *id.* at 795-96, 888 F. Supp. at 1205-06.

On appeal, and like the CIT, the Federal Circuit rejected IC&S's primary argument that the protest requirement of 19 U.S.C. § 1514 does not apply in a government enforcement action. See *Cherry Hill*, 112 F.3d at 1557-58. Indeed, the court expressly held that, generally,



one must challenge a Customs liquidation through a valid § 1514 protest in order to be entitled to raise the issue in court. *See id.* at 1557 (“The language of section 1514, that a liquidation will be ‘final and conclusive’ unless protested, is sufficiently broad that it indicates that Congress meant to foreclose unprotested issues from being raised in any context, not simply to impose a prerequisite to bringing suit.”).

The Federal Circuit reversed the CIT, however, on a narrower ground. Despite the general rule that, without timely protest, all liquidations, whether legal or not, become final and conclusive under 19 U.S.C. § 1514, the court concluded that IC&S’s deemed liquidation issue “did not have to be raised through a protest, and that the trial court should have considered [the] issue on the merits.” *Id.* at 1558. In so doing, the court distinguished other Federal Circuit cases that had adhered to the general rule and denied the importer the right to challenge a Customs liquidation in court for failure to initiate a § 1514 protest:

The problem with the liquidation at issue in this case . . . is of a different character. The asserted flaw in this case is not in the accuracy of the liquidation or the lawfulness of the process leading up to it, but in the effect that the government seeks to give it—the effect of displacing the liquidation that had already taken effect by operation of law pursuant to the ‘deemed liquidation’ statute, 19 U.S.C. § 1504(a).

*Id.* at 1559 (distinguishing *Juice Farms*, 68 F.3d 1344; *Omni U.S.A., Inc. v. United States*, 840 F.2d 912 (Fed. Cir. 1988); and *United States v. A.N. Deringer, Inc.*, 66 C.C.P.A. 50 (1979)). Thus, the Federal Circuit recognized a distinction for a deemed liquidation argument.

Buttressing the court’s reasoning was the potential for abuse if an importer or surety were required to protest a liquidation in order to preserve the right to challenge it on the ground of deemed liquidation. *See id.* at 1560. The court explained that, if such were the case,

[T]here would be nothing, in theory, that would prevent Customs from conducting multiple successive liquidations of the same entry and requiring the importer or surety to assume the burdens of protesting each one. Likewise, Customs could purport to liquidate an entry anew, years after the first liquidation had become final, and thereby impose liability on the importer or surety if the importer or surety were not vigilant in watching for notice of such untimely liquidations or if it were no longer able to undertake the burden of filing and pursuing a protest.

The potential for abuse from a rule requiring protests in such cases is sufficiently plain that we think it unlikely that Congress would have intended the protest requirement to apply so broadly.

*Id.* at 1560.

Thus, *Cherry Hill* stands for the proposition that an importer need not protest a purported liquidation by Customs “in order to be entitled to defend against liability on the ground of the deemed liquidation.” *Id.* The case before us, however, is different. Here, Fujitsu does not seek to raise its deemed liquidation claim as a defense; rather, Fujitsu seeks to bring action in this Court under 28 U.S.C. § 1581(i). As noted above, it is well-established that “[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.” Miller, 824 F.2d at 963. Above, we established that Fujitsu could have protested Customs’ purported liquidations under 19 U.S.C. § 1514(a)(5). Such action would have afforded Fujitsu jurisdiction in this Court under 28 U.S.C. § 1581(a). Indeed, as demonstrated above, Fujitsu did attempt to raise its deemed liquidation argument before Customs; Fujitsu simply did not meet the timeliness requirement for protests under 19 U.S.C. § 1514(c). *Cherry Hill* did not address whether an importer may invoke the CIT’s jurisdiction under § 1581(i) to raise the issue of deemed liquidation in order to invalidate a subsequent liquidation by Customs. To find that *Cherry Hill* affords Fujitsu jurisdiction under 28 U.S.C. § 1581(i) to raise its deemed liquidation argument in the circumstances of this case would require us to create an exception to the well-established § 1581(i) that we are unwilling to make.

Moreover, our holding does not impair the important policy considerations discussed in *Cherry Hill*. As quoted above, the Federal Circuit expressed concern that to deny IC&S the right to defend on the ground of deemed liquidation would allow Customs to conduct multiple liquidations and force the importer or surety to protest each one. See *Cherry Hill*, 112 F.3d at 1560. Such abuse will not result from our decision in this case.

Here, for instance, once Customs liquidated the subject entries, Fujitsu was faced with a curious election of remedies. Fujitsu could have either protested the purported liquidation through the § 1514 procedure or done nothing and waited for Customs to bring forth an enforcement action. Had Fujitsu chosen the latter route, Fujitsu would not have been foreclosed—as a defendant—from asserting the affirmative defense of deemed liquidation. Fujitsu did not choose this remedy, however. Instead, Fujitsu attempted to protest the liquidation under § 1514, but failed to do so within the provision’s time limits. Subsequently, Fujitsu brought an action in this Court as plaintiff. Because Fujitsu had an adequate remedy under 28 U.S.C. § 1581(a), however, Fujitsu cannot invoke this Court’s jurisdiction under § 1581(i).

Thus, in keeping with *Cherry Hill*, importers are not required to protest liquidations by Customs on the ground of deemed liquidation. But if they choose to do so, they must meet the requirements of 19 U.S.C. § 1514 to preserve the right to raise the issue in the CIT as a

plaintiff under 28 U.S.C. § 1581(a). The Court does not have jurisdiction under 28 U.S.C. § 1581(i) to decide whether the purported liquidation by Customs must be invalidated on the ground of deemed liquidation.<sup>11</sup>

Therefore, the Court concludes that it does not have jurisdiction under § 1581(i) to hear Fujitsu's deemed liquidation claims for the entries covered by protests 2704-98-100059 and 3001-98-100026.

*B. Section 1581(a) jurisdiction and Protest No. 5301-98-100053*

Fujitsu filed Protest No. 5301-98-100053 against Customs' February 27, 1998, liquidation of entry 86-222766-5. On April 1, 1998, Fujitsu submitted to Customs a supplemental deemed liquidation claim. See Pl.'s Apr. 1, 1998, Letter to Customs (Pl.'s Mem. in Supp. of Mot. SJ II, Ex. 2). Because Fujitsu filed the deemed liquidation claim within ninety days of notice of the liquidation, the claim constitutes a timely amendment to Protest No. 5301-98-100053 under 19 U.S.C. § 1514(c). Therefore, this Court has jurisdiction under 28 U.S.C. § 1581(a) to review whether entry 86-222766-5 was deemed liquidated.

II. WAS ENTRY 86-222766-5 DEEMED LIQUIDATED BY  
OPERATION OF LAW UNDER 19 U.S.C. § 1504(D)?

*A. Notice to Customs under § 1504(d)*

As outlined above, Fujitsu argues that, under § 1504(d), Customs had notice that the court-ordered suspension of liquidation was removed on July 3, 1996, the date the Federal Circuit issued its decision in *Fujitsu General Ltd.*, 88 F.3d 1034, and entered judgment. See Pl.'s Mem. in Supp. of Mot. SJ II at 10. Customs liquidated entry 86-222766-5 on February 27, 1998, well over a year after the issuance of this decision. Therefore, Fujitsu maintains, "The [entry] must be deemed liquidated by operation of law at the rate and amount of antidumping duties asserted at the time of entry by the importer of record, *i.e.*, zero antidumping duties pursuant to 19 U.S.C. § 1504(d)(1994)."<sup>12</sup> Here, Fujitsu's goods were entered from March 20, 1986, through March 11, 1988. The goods entered after June 10, 1985, and before March 20, 1987, were subject to a zero cash deposit requirement pursuant to Commerce's final results issued in *Television Receiving Sets, Monochrome and Color, From Japan*, 50 Fed. Reg. 24,278, 24,283 (Dep't Commerce, June 10, 1985)(final results admin. review)(finding a zero dumping margin for General Corporation). Likewise, Commerce waived a cash deposit requirement for Fujitsu's goods entered on or

<sup>11</sup>As indicated above, however, *supra* pp. 16-17, in a situation where Customs has not yet actively liquidated entries that an importer believes had already been deemed liquidated under § 1504, the importer could invoke the CIT's jurisdiction under 28 U.S.C. § 1581(i) to obtain a declaratory judgment to that effect. Once Customs liquidates, however, the importer is precluded from invoking § 1581(i) jurisdiction, because, at that point, Customs has made a protestable decision, thereby creating the avenue to jurisdiction under § 1581(a).

<sup>12</sup>"The amount of duties 'asserted at the time of entry by the importer', within the meaning of § 1504(a) and (d), is not what the importer *desires* to assert upon entry, but what the importer is *required* by Customs officers to assert when filing the entry summary." *American Permac*, 10 CIT at 544 n.12, 642 F. Supp. at 1195 n.12.

after March 20, 1987, and before February 11, 1988, pursuant to the final results issued in *Television Receivers, Monochrome and Color, From Japan*, 52 Fed. Reg. 8,940, 8,947 (Dep't Commerce, Mar. 20, 1987)(final results admin. review)(finding a *de minimis* dumping margin for Fujitsu General Limited). Fujitsu's entry 110-0639314-1, dated March 11, 1988, was entered after February 11, 1988, and therefore, was subject to a 4.06% cash deposit rate pursuant to the final results issued in *Television Receivers, Monochrome and Color, From Japan*, 53 Fed. Reg. 4,050, 4,055 (Dep't Commerce, Feb. 11, 1988)(final results admin. review)(finding a 4.06% dumping margin for Fujitsu General Limited). Pl.'s Mem. in Supp. of Mot. SJ II at 7-8.

Defendant counters that Customs did not have notice that the suspension of liquidation was removed until Customs received Commerce's Liquidation Instructions of September 26, 1997. See Def.'s Opp'n to Pl.'s Mot. SJ II at 17; Def.'s Reply Br. II at 9. Customs liquidated entry 86-222766-5 on February 27, 1998. Therefore, Defendant maintains, because Customs liquidated the subject entry within six months of receiving notice of the removal of suspension, the entry was not deemed liquidated under § 1504(d).

The issue to be determined, therefore, is when did Customs have notice under § 1504(d) that the court-ordered suspension of liquidation was removed.

In answering this question, it is crucial to keep in mind the context in which the CIT first ordered that liquidation of the subject entries be enjoined. Substantively, the CIT was reviewing the final results of an administrative review conducted by Commerce. Thus, the CIT reviewed Commerce's *Final Results of February 11, 1991* pursuant to 19 U.S.C. § 1516a, which governs judicial review in countervailing duty and antidumping duty proceedings. Under the authority of § 1516a(c)(2), the CIT ordered that the liquidation of the subject entries be enjoined.

Subsection 1516a(e) explains how liquidation will proceed where entries are subject to a determination that is being judicially reviewed pursuant to § 1516a. The provision states,

If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,

shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

19 U.S.C. § 1516a(e). Thus, for purposes of liquidation, the statute distinguishes entries that are not enjoined from those that are enjoined pursuant to § 1516a(c)(2).

Here, when Fujitsu General Limited brought suit in the CIT challenging Commerce's *Final Results of February 11, 1991*, the court ordered an injunction enjoining liquidation of the subject entries pursuant to § 1516a(c)(2). Section 1516a(e)(2) of Title 19 directs that "entries, the liquidation of which was enjoined under [§ 1516a(c)(2)], shall be liquidated in accordance with the *final court decision* in the action." (Emphasis added.) "Final" in the context of § 1516a(e) means "conclusive;" a court decision is conclusive when it can no longer be appealed. See *Timken Co. v. United States*, 893 F.2d 337, 339-40 (Fed. Cir. 1990). Therefore, "§ 1516a(e) requires that liquidation, once enjoined, remains suspended until there is a 'conclusive court decision which decides the matter . . .'" *Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85 F.3d 589, 591 (Fed. Cir. 1996)(quoting *Timken*, 893 F.2d at 342).

The Federal Circuit issued its decision affirming Commerce's *Modified Final Results of February 11, 1991* on July 3, 1996. See *Fujitsu General Ltd.*, 88 F.3d 1034. That decision was not conclusive, however, until the time allowed for applying for a writ of certiorari for review in the U.S. Supreme Court expired on October 1, 1996.<sup>13</sup> See 28 U.S.C. § 2101(c)(1994)("[A]ny writ of certiorari intended to bring any judgment . . . in a civil action . . . before the Supreme Court for review shall be . . . applied for within ninety days after the entry of such judgment . . ."). Therefore, contrary to Fujitsu's assertion, the Federal Circuit's decision of July 3, 1996, could not have served as notice to Customs of the removal of the court-ordered suspension, because, under 19 U.S.C. § 1516a(e)(2), the injunction did not dissolve on that date.<sup>14</sup> Rather, the injunction dissolved upon the action's becoming conclusive on October 1, 1996.

<sup>13</sup>In *Timken*, the Federal Circuit specifically addressed whether an appealed CIT decision is a "final court decision" within the meaning of 19 U.S.C. § 1516a(e). See 893 F.2d at 339-40. In so doing, the court declined to decide "whether a decision of [the Federal Circuit] is 'final' within the meaning of § 1516a(e) before the time for application for certiorari to the Supreme Court expires[.]" since that issue was not before the court. See *id.* at 340 n.5. The "final court decision" language of § 1516a(e), however, refers to both CIT and Federal Circuit decisions. Therefore, the necessary result of *Timken* is that, for the purposes of § 1516a(e), a decision of the Federal Circuit is not "final" until it is conclusive, i.e., until the time for applying for certiorari to the Supreme Court expires.

<sup>14</sup>We recognize that, in *American Permac, Inc. v. United States*, 191 F.3d 1380, 1381 (Fed. Cir. 1999), the Federal Circuit stated, "The 'triggering event' for the running of the 6-month time period under [19 U.S.C. § 1504(d)(1994)] . . . is the lifting of the suspension on liquidation, which here occurred [when the CIT finally affirmed the final results of Commerce's administrative review] . . ." This sentence, however, is mere dicta. In that case, the court resolved the issue of whether the 1994 version of 19 U.S.C. § 1504(d) could be retroactively applied to liquidations that had occurred prior to the provision's effective date on December 8, 1993. See *id.* The court held that it could not. See *id.* Read in context, the court made the above quoted statement not as a holding, but rather to demonstrate that the amended version of § 1504(d), if applied in that case, would have had an impermissible retroactive effect. See *id.* Under 19 U.S.C. § 1516a(e), a court-enjoined liquidation remains suspended, not until the issuance of a court decision resolving the matter, but until there is a court decision that is conclusive, i.e., no longer subject to appeal. See *Hosiden*, 85 F.3d at 591.

Section 1516a(e) also sheds light on when Customs may be charged with notice of the injunction's dissolution for the purposes of § 1504(d). "For purposes of liquidation, . . . court decisions are not executed until the administering agency publishes notice of such decisions in the Federal Register pursuant to 19 U.S.C. § 1516a(e)." *Timken Co. v. United States*, 13 CIT 454, 456, 715 F. Supp. 373, 375 (1989), aff'd, 893 F.2d 337. Applying § 1516a(e) to a Commerce determination, the Federal Circuit has held that, "[i]f the CIT ([or the Federal Circuit]) renders a decision which is not in harmony with Commerce's determination, then Commerce must publish notice of the decision within ten days of *issuance* (i.e., entry of judgment), regardless of the time for appeal or of whether an appeal is taken." *Timken*, 893 F.2d at 341. The court reasoned that § 1516a(e) distinguishes between "final court decision" and "court decision." *See id.* at 340 ("We are of the opinion that Congress intentionally used the word 'final' only once in § 1516a(e) to convey one meaning, but omitted the word elsewhere in that section . . . to convey another meaning."). Thus, under § 1516a(e), while a liquidation must proceed in accordance with the "final," i.e., conclusive, court decision in the action, the administering agency must publish notice of the adverse court decision within ten days of its issuance. *See id.* at 340-41.

The court's holding in *Timken*, however, was limited to entries that have not been enjoined under § 1516a(e)(1). *See id.* at 338 n.3. For these entries, "the effect of the publication is to indicate that liquidation should no longer take place in accordance with Commerce's determination." *Id.* at 341.<sup>15</sup> Section 1516a(e) does not expressly address whether, where liquidation *is* enjoined by court order, Commerce must publish notice that the court action is final and conclusive, thereby terminating the suspension of liquidation, in the Federal Register. Nevertheless, there are two principles we can glean from § 1516a(e) that help to resolve the question of when Customs had notice in our case.

First, under § 1516a(e), it is clear that issuance of a court decision by itself does not constitute notice for the purposes of liquidation. Rather, the administering agency must publish notice of the court decision in the Federal Register. Here, Commerce is the administering agency; Commerce issued the administrative review determination that was litigated. Customs' role in antidumping matters is purely ministerial. *See Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994). Therefore, unless Customs receives direct

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<sup>15</sup>Because, pursuant to § 1516a(e), liquidation shall be in accordance with the *final* court decision in the action, however, "it is [then] necessary to suspend liquidation until there is a *conclusive* decision in the action." *Timken*, 893 F.2d at 341.



notice from a court, we cannot attribute notice to Customs of a court decision reviewing a Commerce determination made under 19 U.S.C. § 1516a(a) without publication of notice of the court decision by Commerce in the Federal Register.<sup>16</sup>

Second, if, under § 1516a(e), Commerce's publication in the Federal Register of an adverse court decision constitutes notice to Customs that liquidation of entries that are not subject to court injunction should no longer proceed in accordance with the litigated Commerce determination, it logically follows that Commerce's publication in the Federal Register of a *conclusive* court decision in the action may constitute notice to Customs that a court-ordered suspension of liquidation is removed.

Here, this is precisely what happened. On September 16, 1997, Commerce published notice of the Federal Circuit's decision of July 3, 1996, and of the amended final results. *See Television Receivers, Monochrome and Color, From Japan*, 62 Fed. Reg. 48,592 (Dep't Commerce, Sept. 16, 1997)(notice of final court decision and am. final results admin. review)(*"Federal Register Notice"*). In its *Federal Register Notice*, Commerce stated,

As there is now a final and conclusive court decision in this action, we are amending our final results of review in this matter and we will subsequently instruct the U.S. Customs Service to liquidate entries subject to this review.

. . . .

Pursuant to 19 U.S.C. § 1516a(e), we are now amending the final results of administrative review for television receivers, monochrome and color, from Japan, with respect to [Fujitsu General Limited], for the above-referenced periods. The revised weighted-average margin for these periods is 26.17 percent.

*Id.*

Thus, applying the necessary implications of § 1516a(e), Commerce's *Federal Register Notice* constituted sufficient notice to Customs that the court-ordered injunction had dissolved, because the notice indicated that the litigation suspending liquidation was now conclusive. Under § 1504(d), Customs must liquidate within six months of receiving notice that a court-ordered suspension is removed. Here, Commerce published its *Federal Register Notice* on September 16, 1997; therefore, Customs had notice that the court injunction enjoining liquidation of the subject entries was dissolved on that date. Customs

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<sup>16</sup>We recognize that the Department of Justice ("DOJ") typically represents both Commerce and Customs in their respective matters before the court. Nevertheless, we decline to attribute notice to Customs of the issuance of a court decision reviewing a Commerce determination under 19 U.S.C. § 1516a simply because the DOJ represents both agencies. As noted above, § 1516a(e) places the obligation to publish notice of the court decision on the agency that authored the litigated determination. *See Timken*, 13 CIT at 456, 715 F. Supp. at 375. Therefore, it follows that notice under § 1516a(e) by virtue of issuance of a court decision can only be attributed to the administering agency.

liquidated entry 86-222766-5 on February 27, 1997; therefore, as a matter of law, the entry was not deemed liquidated under § 1504(d).

*B. Commerce's delay*

While holding that Customs liquidated the subject entry within the time limit prescribed by § 1504(d), the Court does sympathize with Fujitsu's complaint. The court-ordered injunction dissolved on October 1, 1996. Yet, Commerce did not issue notice of the suspension's removal until nearly a year later. Essentially, then, Fujitsu's real claim is against Commerce for its delay in issuing notice and liquidation instructions<sup>17</sup> to Customs. See Pl.'s Opp'n to Def.'s Cross Mot. SJ II at 12 ("Commerce cannot thwart the plain meaning of [19 U.S.C. § 1504(d)] and the intent of Congress by delaying notice to Customs.").

Section 1504(d), however, clearly indicates that deemed liquidation will occur only if liquidation does not occur within six months of Customs' receiving notice of the removal of a suspension on liquidation. As explained in section II.A, Customs liquidated the subject entry within six months of receiving notice of the suspension's removal. Therefore, Fujitsu cannot successfully argue that its merchandise must be deemed liquidated under § 1504(d) as a result of Commerce's delay in issuing notice of the suspension's removal.

Indeed, in the circumstances of this case, such a remedy would be overbroad. Presumably, Fujitsu stands to escape considerable anti-dumping liability if its entries were deemed liquidated. Addressing a similar situation in *American Permac*, 10 CIT at 546 n.14, 642 F. Supp. at 1197 n.14, this court stated: "The resulting windfall to plaintiffs would penalize not only the [government], by depriving it of revenues, but also plaintiffs' domestic competitors (who played no part in [Commerce's] delay), by depriving them of the protection of the anti-dumping law." Moreover, as the court in that case indicated, Fujitsu is not left without a remedy to prevent Commerce delays in the issuance of notice and liquidation instructions to Customs. Fujitsu could have brought a judicial action to compel Commerce to issue notice and liquidation instructions by virtue of this court's jurisdiction under 28 U.S.C. § 1581(i)(4). Cf. *id.* at 540-41, 642 F. Supp. at 1192 (citing *Brock v. Pierce County*, 476 U.S. 253, 260 n.7; *Allen v. Regan*, 9 CIT 176, 177-78, 607 F. Supp. 133, 134-35 (1985)); cf. also *Timken*, 893 F.2d

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<sup>17</sup>As discussed above, Commerce, not Customs, determines antidumping rates; therefore, "Customs merely follows Commerce's instructions in assessing and collecting duties." *Mitsubishi*, 44 F.3d at 977. Because Customs does not calculate the antidumping duty rates itself, Customs typically awaits Commerce's instructions before proceeding to collect final antidumping duties. Cf. 19 U.S.C. § 1673e(a); 19 C.F.R. §§ 353.21 (a), 353.22(c)(10)(1997).

at 342 (affirming the CIT's granting of plaintiff's application for a writ of mandamus, ordering Commerce to publish notice of a court decision within ten days of its issuance pursuant to 19 U.S.C. § 1516a(e)).<sup>18</sup> 19 U.S.C. § 1675(a)(3)(C)(1994)(effective for Commerce administrative reviews initiated after January 1, 1995). Thus, the amendment to § 1675(a) directs that, where liquidation is enjoined by court order pending the litigation of the final results of an administrative review, Commerce must publish notice of the final disposition and issue liquidation instructions to Customs within ten days of the final disposition. *American Permac* instructs that Fujitsu could invoke the CIT's jurisdiction under 28 U.S.C. § 1581(i) to enforce the statutory deadline. See 10 CIT at 540-41, 642 F. Supp. at 1192; see also *Timken*, 893 F.2d at 342.

Fujitsu did not avail itself of such a remedy, however, and, given the undisputed facts here, the Court must hold that Fujitsu's entry was not deemed liquidated as a matter of law by Commerce's delay in issuing liquidation notice that the court injunction enjoining liquidation had dissolved.

### III. DID CUSTOMS PROPERLY ASSESS INTEREST ON FUJITSU'S ENTRIES UNDER 19 U.S.C. § 1677G?

#### A. Background

Upon publication of an antidumping duty order, importers are required to deposit with Customs estimated antidumping duties on entries subject to the order pending ultimate liquidation. See 19 U.S.C. § 1673e(a)(3). Upon the completion of subsequent administrative reviews, Commerce directs Customs to assess the determined antidumping rate on entries subject to the review and to continue to collect cash deposits of estimated antidumping duties on future entries at the rate determined in the administrative review. See 19 U.S.C. § 1675(a); 19 C.F.R. § 353.22(c)(10).

Here, the subject entries were made from March 20, 1986, through March 11, 1988. The entries were thus subject to the deposit requirements of the administrative reviews whose final results were published on June 10, 1985; March 20, 1987; and February 11, 1988. See *Television Receiving Sets, Monochrome and Color, From Japan*, 50 Fed. Reg. 24,278, 24,283 (Dep't Commerce, June 10, 1985)(final results admin. review)(finding a zero dumping margin for General Cor-

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<sup>18</sup>Although not applicable to the administrative reviews in this case, 19 U.S.C. § 1675(a) was amended in 1994 to provide,

In a case in which [the final results of an administrative review are] under review under section 1516a of this title and a liquidation of entries covered by the determination is enjoined under section 1516a(c)(2) of this title . . . , [Commerce] shall, within 10 days after the final disposition of the review under section 1516a of this title, transmit to the Federal Register for publication the final disposition and issue instructions to the Customs Service with respect to the liquidation of entries pursuant to the review

poration); *Television Receivers, Monochrome and Color, From Japan*, 52 Fed. Reg. 8,940, 8,947 (Dep't Commerce, Mar. 20, 1987)(final results admin. review)(finding a *de minimis* dumping margin for Fujitsu General Limited); *Television Receivers, Monochrome and Color, From Japan*, 53 Fed. Reg. 4,050, 4,055 (Dep't Commerce, Feb. 11, 1988)(final results admin. review)(finding a 4.06% dumping margin for Fujitsu General Limited). Commerce did not require cash deposits for entries made on or after June 10, 1985, and March 20, 1987, because the dumping margins calculated in the administrative review results published on those dates were zero and *de minimis*. Commerce did, however, require a 4.06% *ad valorem* cash deposit on entries made on or after February 11, 1988, pursuant to the final results published on that date. Thus, Fujitsu was not required to make cash deposits of estimated antidumping duties for its entries until February 11, 1988.

Under 19 U.S.C. § 1677g (1994), interest is made on antidumping duty payments. The provision states,

Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—(1) the date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title, or (2) the date of a finding under the Antidumping Act, 1921.

19 U.S.C. § 1677g. Commerce instructs Customs “to calculate interest for each entry from the date that a cash deposit is required to be deposited for the entry through the date of liquidation of the entry.” 19 C.F.R. § 353.24(c)(1997).

Here, upon liquidation, Customs assessed antidumping duties on each subject entry at the final rate, 26.17%, with interest on the total antidumping duty payment calculated from the date of entry to the date of liquidation. Fujitsu, however, argues that, pursuant to § 1677g, interest is only properly assessed on entries for which cash deposits were required. See Pl.’s Mem. in Supp. Mot. SJ II at 14. Fujitsu asserts that, “[w]ith the exception of entry no. 110-0639314-1, the merchandise imported under cover of the subject entries was entered for consumption prior to February 11, 1988, and thus, did not require a cash deposit of estimated antidumping duties[;]” therefore, Fujitsu maintains, interest is not properly assessable on the entries made before February 11, 1988. See *id.* at 16-17. Fujitsu bases its argument on the Federal Circuit’s decision in *Timken Co. v. United States*, 37 F.3d 1470 (Fed. Cir. 1994).

Defendant counters that Customs properly assessed interest on Fujitsu’s entries. See Def.’s Opp’n to Pl.’s Mot. SJ II at 23-30. Defendant bases its argument on the Federal Circuit’s decision in *Sharp Elec. Corp. v. United States*, 124 F.3d 1447 (Fed. Cir. 1997).

### B. Jurisdiction

Jurisdiction of this issue is predicated on 28 U.S.C. § 1581(a) (“The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515].”). As reviewed earlier, for the Court to exercise jurisdiction under § 1581(a), Fujitsu’s interest claim must have been presented to Customs in the form of a valid protest under 19 U.S.C. § 1514. *See Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908 (Fed. Cir. 1999). Fujitsu’s interest argument satisfies the § 1514 requirements if it was directed toward a protestable Customs decision and filed within the time limits of § 1514(c).

As previously noted, in *Mitsubishi*, the Federal Circuit held that, because of its ministerial role in antidumping matters, Customs did not make a protestable decision as to the antidumping rate upon liquidation. *See* 44 F.3d at 977. Here, regarding the interest to be assessed on the antidumping duty payment, Commerce’s Liquidation Instructions merely directed that “[i]nterest shall be calculated from the date payment of estimated antidumping duties is required through the date of liquidation.” These instructions appear ambiguous as to whether or not interest is assessable on entries for which no estimated duty deposits are required. Therefore, Customs made a protestable decision in this case because Customs unilaterally determined that, under 19 U.S.C. § 1677g, interest was assessable on Fujitsu’s entries for which no cash deposits were required. Customs’ decision was thus protestable under § 1514(a)(3). *See Castelazo*, 126 F.3d at 1462 (“We have held that a bill for interest is a ‘charge or exaction’ that falls under the purview of § 1514(a)(3)(citing *New Zealand Lamb*, 40 F.3d at 382).”).

Moreover, Fujitsu’s protest of Customs’ assessment of interest on its entries was timely. Under § 1514(c)(3)(B), a charge for interest must be protested within ninety days of the date on which Customs informed the payee of the interest charge. *See New Zealand Lamb*, 40 F.3d at 382. A Customs’ liquidation that does not mention interest would not constitute a “decision[] regarding interest for purposes of starting the running of the § 1514 limitations period against [Fujitsu].” *Id.*

Here, Fujitsu challenged Customs’ assessment of interest on (1) February 11, 1998 (Protest No. 2704-98-100059 and Protest No. 3001-98-100026) against the liquidations dated November 14, 1997, November 28, 1997, and December 5, 1997,; and (2) March 24, 1998 (Protest No. 5301-98-100053) against the liquidation dated February 27, 1998. Because Fujitsu protested Customs’ assessment of interest within ninety days of the liquidations, there is no doubt—and no party disputes—that Fujitsu filed its protest within ninety days of Customs’ assessment of interest. Therefore, Fujitsu’s protest challenging Customs’ assessment of interest was timely filed under § 1514(c)(3).

Because Fujitsu’s interest argument was raised before Customs in a valid protest under § 1514, this Court has jurisdiction to review the

issue under 28 U.S.C. § 1581(a).

### C. Analysis

The issue is whether, under 19 U.S.C. § 1677g, interest may be assessed on underpayments of antidumping duties where no cash deposits were required for the subject entries. Fujitsu interprets the Federal Circuit's decision in *Timken*, 37 F.3d 1470, to stand for the proposition that "application of the antidumping interest provision, 19 U.S.C. § 1677g, is triggered by the posting of cash deposits of estimated antidumping duties." Pl.'s Mem. in Supp. Mot. SJ II at 17. Therefore, Fujitsu maintains, where, as here, Commerce did not require cash deposits of estimated dumping duties (with the exception of entry 110-0639314-1), no interest is owing. *See id.*

It is true that in *Timken* the court stated, "In order to be liable for or entitled to interest under section 1677g(a), [importers] must have made cash deposits of estimated duties." *Timken*, 37 F.3d at 1477. But as the Federal Circuit subsequently pointed out in *Sharp*, despite that sentence, the *Timken* decision did not stand for the proposition that interest is assessable only where cash deposits of estimated duties are actually paid, but rather was limited to addressing "the distinction between cases in which a bond is posted and cases in which a cash deposit is required." 124 F.3d at 1449-50.

In *Timken*, the court held that the "amounts deposited" term of § 1677g(a) "refers solely to cash deposits of estimated duties provided under sections 1671e(a)(3)[(countervailing duty order)] and 1673e(a)(3) [(antidumping duty order)]." 37 F.3d at 1476. Because, in that case, the importers had posted bonds, rather than cash deposits of estimated antidumping duties, the court held that the interest provision did not apply. *See id.* at 1477.

In *Sharp*, the Federal Circuit addressed whether Customs properly assessed interest under § 1677g(a) on the importer's 100% underpayment of antidumping duties where Commerce had waived the importer's cash deposit requirement under § 1673e(a)(3). *See* 124 F.3d at 1449. In that case, Commerce had waived the deposit requirement because the relevant dumping margin was *de minimis*. *See id.* at 1448. As here, the importer argued "that the interest provision only applies, by its express terms, to 'amounts deposited[.]'" Because the importer had not made a deposit, it argued that no interest was owing. *See id.* at 1449. In response, the court stated,

We disagree. To be sure, section 1677g speaks in terms of "amounts deposited," but it also speaks to "underpayments." Here, the underpayment was 100% of the final assessed duty. Therefore, interest is due on the entire assessment, unless the provision only applies when "amounts" are actually "deposited." We hold the provision applies whenever such amounts are statutorily owed, whether or not actually deposited, because any other result would be absurd.



*Id.*

Cash deposits of estimated antidumping duties are statutorily owed upon the issuance of the antidumping duty order. *See* 19 U.S.C. § 1673e(a)(3). “Under section 1673e(a)(3), a cash deposit acts as a method of *payment* of preliminary duties” subject to the antidumping duty order prior to liquidation. *Timken*, 37 F.3d at 1477 (emphasis added). Bonds, conversely, act “as *security* for undetermined future payments” during the pre-antidumping duty order, investigative phase. *Id.* (emphasis added); 19 U.S.C. § 1673b(d)(1)(B). Pursuant to § 1677g(a), interest is assessable on *payments* of antidumping duties, but not on instruments serving as *security* for payments, such as a bond. Therefore, the “amounts deposited” language of § 1677g(a) simply indicates that the existence of an antidumping duty order (or a countervailing duty order, as the case may be) triggers the application of the interest provision.

Simply because the dumping margin calculated in a subsequent administrative review is found to be zero or *de minimis*, however, does not mean that the importer is no longer statutorily obligated to make a cash deposit on future entries; instead, it means either that the importer is obligated to make a cash deposit of zero, or that the estimated duty is so low that Commerce waives the deposit requirement for the sake of administrative convenience. The importer’s entries are still subject to the antidumping duty order, and thus, the statutory obligation to make cash deposits of estimated antidumping duties is still in place. *See Sharp*, 123 F.3d at 1449 (stating that there is “no relevant distinction between a zero cash deposit and the waiver of a cash deposit for a *de minimis* margin.”)(citing *American Hi-Fi Int’l, Inc. v. United States*, 20 CIT 910, 936 F. Supp. 1032 (1996)). Therefore, even where the estimated antidumping margin is zero or *de minimis*, interest would be due on the underpayment of antidumping duties under § 1677g(a). *See id.*

“To read section 1677g so literally as to impose liability for interest payments only when cash deposits are actually made would produce absurd results.” *Id.* at 1450. For instance, a first importer who actually made an initial statutorily required deposit, no matter how small, would be required to pay interest on additional duties later found owing. But a second importer whose estimated dumping margin was zero, and therefore, was not actually required to make a cash deposit, would be able to avoid paying any interest on duties later found owing. This result would occur even if the total interest required to be paid by the first importer was substantially less than any interest obligation imposed on the second importer. The result would be inequitable as between them.

*See id.* Where a final assessed antidumping duty rate is greater than the rate at which an importer made deposits upon entry, the true intent of 19 U.S.C. § 1677g is to require the assessment of interest on the underpayment of antidumping duties, whether the underpayment

is 100% or some lesser percentage of the final assessed rate.

Thus, although we acknowledge that the plain language of § 1677g(a) states that interest is only assessed on underpayments of “amounts deposited,” we must avoid this interpretation because it would clearly lead to absurd results. See *United States v. Brown*, 333 U.S. 18, 26-27 (1948); see also *Sharp*, 124 F.3d at 1450 (J. Plager, concurring)( “[T]his is one of those rare cases in which the purpose of Congress is so manifestly clear and the opposite result so silly, that to rule otherwise and require Congress to say it again with a few additional words would be even sillier.”).

Here, Fujitsu’s entries were subject to an antidumping duty finding under the Antidumping Act, 1921. See *Television Receiving Sets, Monochrome and Color, From Japan*, 36 Fed. Reg. 4,597 (Dep’t Treas., Mar. 10, 1971)(antidumping finding). Therefore, as a matter of law, Customs properly assessed interest on the difference between the amounts deposited by Fujitsu upon entry of its merchandise (zero) and the final antidumping duty rate assessed (26.17% *ad valorem*) pursuant to 19 U.S.C. § 1677g(a).

#### IV. DID CUSTOMS PROPERLY ASSESS INTEREST AT A COMPOUND, RATHER THAN A SIMPLE, RATE?

Section 1677g(b) provides that the rate of interest to be charged on overpayments and underpayments of antidumping duties under § 1677g(a) is the rate of interest established under 26 U.S.C. § 6621. In turn, the rate of interest under 26 U.S.C. § 6621 is compounded daily in accordance with § 6622(a)(“In computing the amount of any interest required to be paid under this title . . . such interest and such amount shall be compounded daily.”). See also *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 568 (Fed. Cir. 1989)(“The [Trade and Tariff Act of 1984] amended section 1677g to provide that interest due under it must be compounded in accordance with 26 U.S.C. § 6621 . . .”). Nevertheless, Fujitsu claims that Customs’ assessment of compound interest was “impermissible” as to the subject entries.<sup>19</sup> See Pl.’s Mem. in Supp. of Mot. SJ II at 19.

In making this argument, Fujitsu does not dispute that the plain language of 19 U.S.C. § 1677g(b) requires that interest assessed on antidumping duty payments must be compounded by virtue of 26 U.S.C. §§ 6621, 6622, nor does Fujitsu argue that § 1677g(b) is unconstitutional. Instead, Fujitsu first argues that the assessment of compound interest is inconsistent with the remedial nature of antidumping duties. See Pl.’s Mem. in Supp. of Mot. SJ II at 20. In this sense, Fujitsu argues that the application of compound interest is contrary to the

<sup>19</sup>Fujitsu protested Customs’ decision to assess interest at a compound rate on the subject entries within its initial protests challenging the decision to assess interest at all. See Protest No. 2704-98-100059 (Pl.’s Mem. in Supp. of Mot. SJ I, Ex. 1); Protest No. 3001-98-100026 (Pl.’s Mem. in Supp. of Mot. SJ II, Ex. 4); Protest No. 5301-98-100053 (Pl.’s Mem. in Supp. of Mot. SJ II, Ex.1). As discussed above, *supra* Part III.B, Fujitsu’s initial protests met the requirements of 19 U.S.C. § 1514; therefore, Fujitsu’s compound interest claim also meets the requirements of § 1514. The Court has jurisdiction of this issue under 28 U.S.C. § 1581(a).

intent of antidumping law. *See id.* at 21.

Congress, however, determines the intent of antidumping law, and, under the Trade and Tariff Act of 1984, Congress specifically amended § 1677g to provide that interest on antidumping duty payments must be compounded in accordance with 26 U.S.C. § 6621. *See Canadian Fur*, 884 F.2d at 568. Thus, there is simply no sustainable basis for Fujitsu's assertion that the assessment of compound interest is contrary to the remedial intent of antidumping law.

Second, Fujitsu argues that the application of compound interest violates the government's obligation under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994) ("WTO Antidumping Agreement"). *See* Pl.'s Mem. in Supp. of Mot. SJ II at 22. As a signatory to the Uruguay Round Agreements, the United States has obligations under these agreements. *See Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (1995); *see also* Statement of Administrative Action, H.R. Doc. No. 316, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI, at 669. Even assuming the instruction of 19 U.S.C. § 1677g(b) were somehow inconsistent with the WTO Antidumping Agreement, however, an unambiguous statute will prevail over an obligation under the international agreement. *See Federal Mogul*, 63 F.3d at 1581; *see also* 19 U.S.C. § 3512(a)(1) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."). As 19 U.S.C. § 1677g(b) unambiguously provides that interest on antidumping duty payments must be compounded in accordance with 26 U.S.C. § 6621, even if we were so inclined, this Court cannot alter or repeal the clear instruction of the statute. Therefore, Fujitsu's motion for summary judgment of this issue is denied.

#### CONCLUSION

For the foregoing reasons, the Court denies Fujitsu's motion for summary judgment; Defendant's motion for summary judgment is granted. Judgment will be entered accordingly.

Donald C. Pogue  
*Judge*

Dated: August 15, 2000  
New York, New York

Slip Op. 00-98

FUJITSU GENERAL AMERICA, INC., SUCCESSOR-IN-INTEREST TO TEKNIKA, ELECTRONICS CORP., PLAINTIFF, V. UNITED STATES DEPENDENT

Consol. Ct. No. 98-08-02748

[Plaintiff's motion for summary judgment denied; Defendant's cross-motion for summary judgment granted.]

Decided: August 15, 2000

JUDGMENT

This action has been duly submitted for decision, and this Court, after due deliberation, has rendered a decision herein; now, in conformity with that decision, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Defendant's cross-motion for summary judgment is granted, and final judgment is entered for Defendant.

Donald C. Pogue  
*Judge*

Dated: August 15, 2000  
New York, New York

**[PUBLIC VERSION]**

(Slip Op. 00-99)

U.S. STEEL GROUP – A UNIT OF USX CORPORATION, AND BETHLEHEM STEEL CORPORATION, PLAINTIFFS, v. THE UNITED STATES, DEFENDANT, AND ALGOMA STEEL, INC., DEFENDANT-INTERVENOR

Court No. 97-06-01015

[Commerce Antidumping Review Determination Sustained.]  
Dated: August 15, 2000

*Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, Daniel L. Schneiderman, Stephen Munroe, John J. Mangan, and Ellen Schneider)* for plaintiffs.

*David W. Ogden*, Assistant Attorney General, *David M. Cohen*, Director, (*Velta A. Melnbrensis*), Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Thomas H. Fine*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

*Hogan & Hartson L.L.P. (Mark S. McConnell, Craig A. Lewis, Stephen F. Propst and Behnaz L. Kibria)* for defendant-intervenor.

**OPINION**

RESTANI, *Judge*: This matter is before the court on plaintiffs' USCIT Rule 56.2 motion for judgment on the administrative record. Plaintiffs, domestic steel companies, challenge the final determination in *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 62 Fed. Reg. 18,448 (Dep't Commerce 1997) (final results of antidumping duty admin. review) [hereinafter "*Final Results*"]. At issue therein was the second review period of August 1, 1994 through July 31, 1995.

Plaintiffs request application of adverse facts available pursuant to 19 U.S.C. § 1677e(b) (1994) on the basis that Algoma Steel, Inc. failed to provide cost information requested by the United States Department of Commerce ("Commerce" or "the Department"). Alternatively, plaintiffs request a remand for a new review because the information accepted by Commerce was unreasonably distorted.

**JURISDICTION AND STANDARD OF REVIEW**

The court has jurisdiction under 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty determinations, the court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

**[PUBLIC VERSION]**

(Slip Op. 00-99)

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Dated: August 15, 2000

*Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, Daniel L. Schneiderman, Stephen Munroe, John J. Mangan, and Ellen Schneider)* for plaintiffs.

*David W. Ogden*, Assistant Attorney General, *David M. Cohen*, Director, (*Velta A. Melnbrensis*), Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Thomas H. Fine*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

*Hogan & Hartson L.L.P. (Mark S. McConnell, Craig A. Lewis, Stephen F. Propst and Behnaz L. Kibria)* for defendant-intervenor.

**OPINION**

RESTANI, *Judge*: This matter is before the court on plaintiffs' USCIT Rule 56.2 motion for judgment on the administrative record. Plaintiffs, domestic steel companies, challenge the final determination in *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 62 Fed. Reg. 18,448 (Dep't Commerce 1997) (final results of antidumping duty admin. review) [hereinafter "*Final Results*"]. At issue therein was the second review period of August 1, 1994 through July 31, 1995.

Plaintiffs request application of adverse facts available pursuant to 19 U.S.C. § 1677e(b) (1994) on the basis that Algoma Steel, Inc. failed to provide cost information requested by the United States Department of Commerce ("Commerce" or "the Department"). Alternatively, plaintiffs request a remand for a new review because the information accepted by Commerce was unreasonably distorted.

**JURISDICTION AND STANDARD OF REVIEW**

The court has jurisdiction under 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty determinations, the court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).



## BACKGROUND

During the administrative review, Commerce requested that Algoma respond to the cost of production ("COP") portion of section D of Commerce's questionnaire. *Antidumping Questionnaire* (Sept. 14, 1995), at 1, P.R. Doc. 9, Pls.' App., Tab 4, at 1. Section D requested Algoma (1) to report COP figures based on the actual costs incurred by Algoma during the period of review ("POR") as recorded under its normal accounting system; and (2) to calculate the reported COP figures on a weighted-average basis using model-specific production quantity as the weighting factor. *Id.* at D-1 to D-2, Pls.' App., Tab 4, at 2-3. If Algoma produced the merchandise under review at more than one facility, it was to report COP based on the weighted-average of costs incurred at all facilities. *Id.* at D-2, Pls.' App., Tab 4, at 3. Algoma explained in its responses to Commerce's original and supplemental questionnaires, that it was not reporting COP based on the weighted-average costs incurred at each of its two rolling mills. Algoma's Response to Section B of Questionnaire (Nov. 22, 1995), at B-59 to B-60, P.R. Doc. 43, Pls.' App., Tab 5, at 8-9; *Algoma's Response to Sections A, B and C of Supplemental Questionnaire* (Jan. 19, 1996), at 34, P.R. Doc. 53, Pls.' App., Tab 7, at 3.

Algoma produced all plate sold during the POR at its facility in Sault Ste. Marie, where most of the slab was rolled into plate on the 166" Plate Mill ("plate mill"). *Response to Section B, at B-59*, Pls.' App., Tab 5, at 7. For approximately 20 percent of the total Canadian and U.S. sales reported, however, slab was rolled into plate on Algoma's 106" Wide Strip Mill ("strip mill"). *Id.* According to Algoma, it was not in a position to report actual rolling costs for the subject merchandise at each mill because (1) its cost accounting system computed one average rolling cost for all products rolled on the plate mill and one average rolling cost for all products on the strip mill; (2) less than five percent of the sales of products rolled on the strip mill during the POR would be considered plate based upon Commerce's width/gauge definition for subject merchandise; and (3) Algoma had no records that would permit direct calculation of costs incurred at the strip mill that related only to plate defined by Commerce as subject merchandise. *Id.*, at B-59 to B-60, Pls.' App., Tab 5, at 7-8.

It appeared to Algoma that it had two options to calculate rolling costs for the plate rolled at the strip mill: either (1) assign the average cost of the strip mill to the small fraction (less than five percent) of products produced there that constituted subject merchandise; or (2) assign the average rolling cost of the plate mill to all plate. *Response to Sections A, B, and C*, at 34, Pls.' App., Tab 7, at 3. It appears that the first option would not have been an appropriate choice, because less than five percent of the products rolled on the strip mill during the POR consisted of subject merchandise. Thus, an attempt to allocate costs of the strip mill to the small fraction of the subject merchandise produced on that mill would have been a relatively speculative exer-

cise because virtually all of the cost of the mill relates to non-subject merchandise sheet products. *See id.* The second option appeared to be a good substitute because it was a conservative cost approach because, during the POR, the cost of producing plate on the strip mill was substantially less than the cost of producing plate on the plate mill. *Id.*<sup>1</sup>

Algoma chose the second option. It reported estimated weighted-average rolling costs based upon the actual rolling costs incurred at the plate mill. To allocate these costs to specific products, Algoma developed a “productivity matrix” (or production factors) based upon the length of time it took to produce a product of a specific width and thickness on each mill. *Response to Section B*, at B-57, Pls.’ App., Tab 5, at 5. For each product (*i.e.*, “CONNUM”), Algoma weight-averaged the productivity factor for the plate mill with the productivity factor for the strip mill to derive a composite productivity factor. *Id.* at B-58, Pls.’ App., Tab 5, at 6. Algoma then applied these composite productivity factors to the average cost of production on the plate mill to derive product specific costs for all CONNUMs. *Id.* at B-56 to B-59, Pls.’ App., Tab 5, at 4-7.

At verification, Commerce examined the issue of the two mills in great detail, including Algoma’s analysis of plate mill versus strip mill rolling costs. *Verification of Algoma’s Cost Response* (Aug. 12, 1996), at 10-13, P.R. Doc. 112, Def.’s App., Ex. 1, at 10-13. At verification, Algoma explained that, although it did not track width and gauge for costing purposes in the normal course of business, it did have sensors that can track the length of time that a slab product spends on the mill and that slabs were time stamped for both the plate mill and the strip mill. *Id.* at 11, Def.’s App., Ex. 1, at 11. After the slabs were time stamped, the data was entered into a mill performance data base, from which Algoma selected the weight and time data for slabs produced during the POR and those rolled to plate gauges and sorted the slabs by CONNUMs. *Id.* Commerce verifiers examined a summary of the mill performance data base for both mills, which showed the percentages of the plate mill production and of the strip mill production that were captured by the data base. The verifiers were able to tie the volume and value amounts to process cost sheets for both mills. *Id.* at 11-12, Def.’s App., Ex. 1, at 11-12.

Based upon Algoma’s responses and the results of the verification, Commerce accepted Algoma’s reported costs, stating in pertinent part:

Algoma’s cost reporting methodology is reasonable, considering (1) we verified its cost accounting system, (2) Algoma’s verified

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<sup>1</sup> Higher costs are usually adverse to the respondent. Substantial below cost sales may result in use of cost-based constructed value instead of actual price and a high constructed value will result in a larger antidumping duty margin. See 19 U.S.C. § 1677b(b) (1994) and *infra*, note 3.

inability to determine specific rolling costs based upon the gauge of the material being manufactured at either facility, (3) the conservative methodology adopted by Algoma and verified by the Department, and (4) respondent's compliance with Department instructions on cost reporting methodology in this review.

Final Results, 62 Fed. Reg. at 18,451.

#### DISCUSSION

Commerce's decision not to apply facts available to Algoma for the first administrative review period based on this exact reporting methodology was sustained in *Bethlehem Steel Corp. v. United States*, No. 96-05-01313, 2000 WL 726931, at \*2-5 (Ct. Int'l Trade June 2, 2000). The reasoning of that decision on this point is adopted here. Whatever one's view of Commerce's decision to accept Algoma's methodology, Commerce did accept it here and accepted it previously. Further, there is no allegation that Algoma deceived Commerce or somehow tricked Commerce into accepting a faulty methodology. Thus, Algoma cannot be penalized under 19 U.S.C. § 1677e(b) by the use of adverse facts available for failing to comply to the best of its ability. Algoma gave Commerce exactly what was requested after Commerce's final decision on what it would accept.

The next issue is whether remand for a new review is required because the methodology was distortive. First, the fact that Commerce accepted a different methodology (essentially an expanded productivity matrix) in a subsequent review is irrelevant. Many methodologies may be acceptable. The only real basis for objecting to this methodology hinges on its effect on the difference in merchandise ("DIFMER")<sup>2</sup> adjustment.

Commerce was aware that accepting some high costs (as indicated, normally adverse to the respondent) might cause DIFMER adjustments more favorable to respondents, but it reasonably concluded that COP allocation issues were paramount.<sup>3</sup> Final Results, 62 Fed. Reg. at 18,451. The parties disagree as to the number of sales comparisons affected by a possible DIFMER distortion and the magnitude of the potential

<sup>2</sup> It is well recognized that, in calculating margins, it is not always possible to compare the product sold in the United States to an identical product sold in the home market. If there is no identical product in the home market, the statute directs the Department to base its margin calculation on the next most similar product. 19 U.S.C.A. § 1677(16) (West Supp. 1999). The statute recognizes, however, that an adjustment to price is necessary to account for the fact that the price of the home market product and the price of the U.S. market product will reflect the different costs associated with their different physical characteristics. 19 U.S.C. § 1677b(a)(6)(C)(ii), referring to 19 U.S.C.A. § 1677(16)(B) or (C). The DIFMER adjustment is used to eliminate this cost difference and to permit a fair comparison of the two prices.

<sup>3</sup> In this case the DIFMER issue relates only to rolling costs and not to all costs, so that the DIFMER distortion would have to be quite significant to affect the outcome. On the other hand, the COP calculation is central to any antidumping review. Higher cost numbers tend to lead to higher normal values, and thus higher antidumping margins. Sales at prices below cost in the home market are subject to being eliminated from the calculation of normal value. See 19 U.S.C. § 1677b(b)(1). Higher costs thus tend to remove low priced sales, increasing normal value and increasing antidumping margins. Further, where there are no sales above cost for a given home market product, U.S. sales will be compared to constructed value, not home market prices. See *id.* & see 19 U.S.C. § 1677b(a)(4). And constructed value itself is largely composed of a respondent's costs, so higher costs again will tend to increase dumping margins. See 19 U.S.C. § 1677b(e).

distortion. The court concludes, however, that no possible factual scenario in this record could render Commerce's choice unreasonable or not supported by the record.

First, while Commerce attempts to use the most directly related costs of production as reported by respondents, see 19 U.S.C. § 1677b(f)(1)(A), sometimes allocations are required. As recognized in *Bethlehem* whenever Commerce:

relies on a respondent's other, existing data to ascertain the cost of production, a petitioner may argue that they distort the DIFMER. But the law does not require reliance on actual costs, and the record indicates that the [Department] made a reasonably accurate assessment of the costs in this case, thereby minimizing any arguable distortion.

*Bethlehem*, 2000 WL 726931, at \*5.<sup>4</sup>

Second, Commerce's view that in this case the DIFMER issue likely could affect an extremely small portion of the sales comparison is supported.<sup>5</sup> Commerce reasonably decided not to require a different cost allocation methodology based on the possibility of a DIFMER distortion for a few sales. The court finds the remainder of plaintiffs' arguments are without merit.

Accordingly, Commerce's determination is sustained.

JANE A. RESTANI  
*Judge*

Dated: New York, N.Y.

This 15th day of August, 2000.

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<sup>4</sup> Section 1677b(f)(1)(A) reflects Commerce's long established preference for using a respondent's most directly related reported costs. See 19 U.S.C. § 1677b(f)(1)(A). Commerce, however, is not required to use costs reflected in respondent's records which are distortive. See *Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999), cert. denied, 120 S.Ct. 1830 (2000) (stating that agency may accept records kept according to generally accepted accounting principles or reject records which would distort company's true costs).

<sup>5</sup> In this case, [] of Algoma's [] sales of subject merchandise in the United States were matched to non-identical products sold in the home market. Final Analysis Memorandum (Apr. 3, 1997), at 1, C.R. Doc. 82, Pls.' App., Tab 16, at 1. In all of these [] non-identical matches, the U.S. product was classified within a CONNUM that was produced only on the plate mill. See Comparison of U.S. Products Matched to Non-Identical Home Market Sales, Def. Int.'s App., Ex. 4. Furthermore, [] of these U.S. transactions were matched to home market products within CONNUMs that were produced only on the plate mill. *Id.* (Plaintiffs contend that the [] sales implicate strip mill costs based on petitioners' method of allocation of costs, but Commerce is not barred from testing the hypothetical potential for DIFMER distortion based on full CONNUM information.) For DIFMER on the [] transactions, therefore, Commerce could conclude strip mill costs are irrelevant. Thus, Commerce also could conclude that if Algoma were to use a methodology that allocated strip mill costs to the product categories that were produced on that mill, no costs would be allocated to the CONNUMs involved in these [] transactions, because the strip mill did not produce any products that are classified in those CONNUMs. See Final Analysis Memorandum, at 1-2, Pls.' App., Tab 16, at 1-2.

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Accordingly, Commerce's determination is sustained.

JANE A. RESTANI  
*Judge*

Dated: New York, N.Y.

This 15th day of August, 2000.

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<sup>4</sup> Section 1677b(f)(1)(A) reflects Commerce's long established preference for using a respondent's most directly related reported costs. See 19 U.S.C. § 1677b(f)(1)(A). Commerce, however, is not required to use costs reflected in respondent's records which are distortive. See *Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999), cert. denied, 120 S.Ct. 1830 (2000) (stating that agency may accept records kept according to generally accepted accounting principles or reject records which would distort company's true costs).

<sup>5</sup> In this case, [] of Algoma's [] sales of subject merchandise in the United States were matched to non-identical products sold in the home market. Final Analysis Memorandum (Apr. 3, 1997), at 1, C.R. Doc. 82, Pls.' App., Tab 16, at 1. In all of these [] non-identical matches, the U.S. product was classified within a CONNUM that was produced only on the plate mill. See Comparison of U.S. Products Matched to Non-Identical Home Market Sales, Def. Int.'s App., Ex. 4. Furthermore, [] of these U.S. transactions were matched to home market products within CONNUMs that were produced only on the plate mill. *Id.* (Plaintiffs contend that the [] sales implicate strip mill costs based on petitioners' method of allocation of costs, but Commerce is not barred from testing the hypothetical potential for DIFMER distortion based on full CONNUM information.) For DIFMER on the [] transactions, therefore, Commerce could conclude strip mill costs are irrelevant. Thus, Commerce also could conclude that if Algoma were to use a methodology that allocated strip mill costs to the product categories that were produced on that mill, no costs would be allocated to the CONNUMs involved in these [] transactions, because the strip mill did not produce any products that are classified in those CONNUMs. See Final Analysis Memorandum, at 1-2, Pls.' App., Tab 16, at 1-2.

(Slip. Op. 00-100)

THE UNITED STATES, PLAINTIFF, v. FERRO UNION, INC., AND  
FIREMAN'S FUND INSURANCE CO., DEFENDANTS

Court No. 99-06-00315

Before: *Judge* JUDITH M. BARZILAY

*David W. Ogden*, Assistant Attorney General; *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Kenneth S. Kessler*) for Plaintiff.  
*Peter S. Herrick* for Defendants.

Decided: August 16, 2000

ORDER

BARZILAY, *Judge*:

I. INTRODUCTION

On June 2, 1999, Plaintiff filed a complaint ("*Compl.*") to enforce civil penalties and recover unpaid duties pursuant to 19 U.S.C. § 1592 (1994) for certain entries of carbon steel pipe and tubing from Thailand, imported on or about August 6, 1992. When filing entry documents, Defendant Ferro Union allegedly did not indicate that the merchandise was subject to antidumping and countervailing duties. On October 18, 1999, Defendants filed a motion to dismiss pursuant to USCIT R. 12(b)(5) for failure to state a claim upon which relief can be granted. ("*Def.'s Mot. to Dismiss*"). Further, Defendants petitioned the court to dismiss the case against Fireman's Fund Insurance Co. ("Fireman's Fund") pursuant to USCIT R. 4(m) because service was made one day past the 120 day deadline for proper service. Defendants also raised a 12(b)(6) defense, claiming that an essential party under USCIT R. 19 was not joined in the case. For the reasons that follow, Defendants' motion to dismiss is denied.

II. DISCUSSION

*A. The Complaint states a claim upon which relief may be granted, and provides Defendants with sufficient notice of the claim.*

In reviewing a motion to dismiss for failure to state a claim, the court must assume all well-pled factual allegations to be true, and must make any inferences in favor of the non-moving party. See *Kemet Electronics Corp. v. Barshefsky*, 21 CIT 912, 929, 976 F. Supp. 1012, 1027 (1997) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Defendants are therefore incorrect in their assertion that the court cannot assume that the allegations are truthful when considering a motion to dismiss. See *Defendants' Reply to Plaintiff's Opposition to Dismiss and Memorandum of Law* ("*Defs.' Reply*") at 3.

Assuming the factual allegations to be true, a motion to dismiss will be denied if these allegations state a claim upon which relief can be granted. *See Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969) (holding that in 12(b)(5) motions, material allegations are taken as true and liberally construed in favor of non-moving party); *United States v. Complex Machine Works Co.*, 20 CIT 1080, 1080, 937 F. Supp. 943, 944 n. 2 (1996) (noting that factual allegations will be taken as true for purposes of USCIT R. 12(b)(5) motion only). A motion to dismiss cannot be granted if there is merely one set of provable facts, which would entitle Plaintiff to relief. *See NEC v. United States Department of Commerce*, 20 CIT 1483, 1485, 967 F. Supp. 1305, 1307 (1996) (quoting *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988)). In *United States v. Priscilla Modes, Inc.*, 9 CIT 598, 600, 1985 WL 25788, at \*2 (1985), this court said, “[b]y alleging a violation of 19 U.S.C. § 1592 and the consequent loss of duties, the complaint states a claim upon which relief can be granted.”

Plaintiff’s complaint fulfills the requirements of USCIT R. 8(a)<sup>1</sup> and alleges a set of facts, which if proven, sufficiently state a claim under 19 U.S.C. § 1592. First, Plaintiff brings this case within the court’s jurisdiction under 28 U.S.C. § 1582.<sup>2</sup> *See Compl.*, ¶ 2. Second, Plaintiff alleges that Defendants imported a shipment of carbon steel pipe and tubing and failed to identify the merchandise as subject to anti-dumping and/or countervailing duties. *See id.*, ¶ ¶ 5-8. Plaintiff claims that Defendants’ negligent behavior deprived the government of lawful duties. *See id.*, ¶ ¶ 8, 22. Finally, Plaintiff demands judgment of unpaid duties and penalties. *See id.*, ¶ ¶ 24, 27, 30.

The court additionally notes that the purpose of USCIT R. 8(a) is to provide “fair notice” to Defendants regarding Plaintiff’s claim and the grounds for the claim. *See United States v. F.A.G. Bearings, Ltd.*, 8 CIT 294, 296-97, 598 F. Supp. 401, 404 (1984) (quoting *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)). The six-page complaint states that it is an action to enforce civil penalties and recover unpaid duties pursuant to 19 U.S.C. § 1592, and provides a detailed account of Defendants’ allegedly fraudulent and misleading conduct. *See Compl.*, ¶ 1. Count I details the government’s assertion of a penalty against Ferro Union for negligence, Count II recites Ferro Union’s alleged liability for lost duties, and Count III states the liability of Fireman’s Fun for lost duties. *See id.* at 4-6. The extensive information and substance contained within the complaint provides more than fair notice to Defendants.

In sum, Defendants’ motion to dismiss is denied because assuming the factual allegations are true (as this court is bound to do), the complaint states a claim upon which relief can be granted and gives

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<sup>1</sup>USCIT R. 8(a) provides that a pleading which sets forth a claim for relief shall contain (1) a short and plain statement of the jurisdictional grounds, (2) a short and plain statement of the claim showing entitlement to relief, and (3) a demand for judgment.

<sup>2</sup>28 U.S.C. § 1582 (1994) provides that the Court of International Trade shall have exclusive jurisdiction of a civil action arising out of an import transaction and commenced by the United States:

(1) to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930.

fair notice to Defendants of Plaintiff's claims.

*B. The court finds that good cause exists for the one day delay of service and thus will not dismiss Plaintiff's complaint against Fireman's Fund.*

USCIT R. 4(m) requires service of the complaint and the summons to be made upon a defendant within 120 days after filing of the complaint.<sup>3</sup> However, the rule also provides for an extension of time for service upon a showing of good cause.<sup>4</sup> In order to show good cause, Plaintiff must show an awareness of the 120 day deadline, and must also show that reasonable efforts were made to serve Defendant in a timely manner. *See United States v. Gen. Int'l Mktg. Group*, 14 CIT 545, 548, 742 F. Supp. 1173, 1175-76 (1993).

Fireman's Fund was served with the complaint and summons on October 1, 1999—one day after the September 30 deadline. *Plaintiff's Appendix 5* ("Pl.'s App. 5"). Service was unsuccessfully attempted on September 30. *Plaintiff's Appendix 6* ("Pl. App. 6"). On September 30, the senior special agent of the United States Customs Service authorized to serve Fireman's Fund contacted the Defendant at 4:25 pm, after being delayed in traffic, to give notice that he would arrive around 4:40. During this phone call, he was informed that Fireman's Fund would not accept service after 4:30. *Id.* Customs subsequently served Fireman's Fund the following day, October 1. *Id.*

Customs was aware of the September 30 deadline and made reasonable efforts to ensure proper service was made. *Pl. App. 5*. Although the court does not condone delinquent attention to deadlines, the court finds that Customs made reasonable efforts to timely serve Fireman's Fund. Therefore, good cause exists for Customs' failure to meet the September 30 deadline.

A court must extend the time for proper service when good cause is shown. *See Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340 (7th Cir. 1996).<sup>5</sup> Here, the court will extend the deadline for service so that service to Fireman's Fund on October 1, 1999 is valid. Thus, no grounds exist under USCIT R. 4(m) to dismiss the case against Fireman's Fund.<sup>6</sup>

<sup>3</sup>Prior to December 1, 1993, USCIT R. 4(m) was 4(h) and the comparable Federal Rule of Civil Procedure ("FRCP") was 4(j). After December 1, 1993 the letter designations were harmonized so that USCIT 4(m) and FRCP 4(m) are the same rule.

<sup>4</sup>The court finds good cause in this situation, but also notes that even without good cause the decision to dismiss is within the court's discretion. *See Henderson v. United States*, 517 U.S. 654, 662 (1996) (recognizing that even where a party does not show good cause it remains within the court's discretion whether or not to dismiss upon a showing of late service); *MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097-98 (3rd Cir. 1995). Further, as Plaintiff notes, the Advisory Committee notes to FRCP 4(m) indicate that the rule is not meant to be "determinative" of an action especially where, as in this case, the statute of limitations would bar refiling of a claim. *Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss* ("Pl.'s Mem. in Opp. to Defs.' Mot. to Dismiss") at 20.

<sup>5</sup>The *Panaras* court also noted that in the absence of a good cause showing, the court may in its discretion dismiss or order service within a specified time. *See* 94 F.3d at 340.

<sup>6</sup>The court notes that Defendant Fireman's Fund had ample notice of the potential cause of action through its participation in the administrative process which culminated in a demand letter on May 26, 1999. *See Plaintiff's Appendix 7*.

*C. Defendants' claim that Plaintiff failed to include an indispensable party is without merit.*

Defendants allege that L.E. Coppersmith, a customs broker, failed to include relevant information on the entry summary to indicate that the entries were subject to antidumping and/or countervailing duties. Defendants invoke USCIT R. 12(b)(6), arguing that Coppersmith must be joined as an essential party under USCIT R. 19. Without this joinder, Defendants claim that their ability to litigate the case will be prejudiced, and that they risk incurring "double, multiple, or otherwise inconsistent obligations." USCIT R.19(a).

Defendants' assertions that parties to the litigation will be prejudiced are unconvincing. USCIT R. 19 calls for joinder when complete relief cannot be afforded with presently joined parties. Plaintiff has alleged that Defendants are liable for the unpaid duties and penalties. *See Compl.*, ¶¶ 26, 29. Complete relief for these duties and penalties is attainable from the named defendants. Thus, Defendants have failed to show how Coppersmith's absence impairs Plaintiff's ability to obtain complete relief. *Pl.'s Mem. in Opp. to Defs.' Mot. to Dismiss* at 11. The court therefore finds that Coppersmith is not an essential party to this litigation and rejects Defendants' USCIT R. 12(b)(6) defense as without merit.

### III. Conclusion

There is no basis before the court to dismiss this case.

Therefore, it is hereby ORDERED that Defendants' motion to dismiss is denied.

JUDITH M. BARZILAY  
*Judge*

Dated: \_\_\_\_\_  
New York, NY



(Slip Op. 00-101)

SKF USA INC. AND SKF GMBH, PLAINTIFFS, *v.* UNITED STATES, DEFENDANT,  
THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR

Court No. 99-08-00473

### JUDGMENT

This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *SKF USA Inc. v. United States*, 24 CIT \_\_\_, Slip Op. 00- 28 (March 22, 2000) ("Remand Results"), Torrington's comments to the Remand, and Commerce having complied with the Court's remand, and no other responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on June 20, 2000 are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

NICHOLAS TSOUCALAS  
*Senior Judge*

Dated: August 18, 2000  
New York, New York

(Slip Op. 00-102)

THE TORRINGTON COMPANY, PLAINTIFF, v. UNITED STATES, DEFENDANT, SKF  
USA INC. AND SKF GMBH; ; FAG KUGELFISCHER GEORG SCHAFER AG AND  
FAG BEARINGS CORPORATION, DEFENDANT-INTERVENORS

Court No. 99-08-00461

Before: NICHOLAS TSOUCALAS, *Senior Judge*

Plaintiff, The Torrington Company ("Torrington"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 64 Fed. Reg. 35,590 (July 1, 1999). Defendant-intervenors, SKF USA Inc. and SKF GmbH (collectively "SKF"), oppose Torrington's motion.

Specifically, Torrington claims that Commerce erred in: (1) accepting direct price adjustments that were not tied to SKF's sales; (2) concluding that the adjustments were supported by substantial evidence and did not result in distortion; and (3) making two errors in the computer program that calculates SKF's dumping margins. SKF contends that: (1) Commerce acted lawfully in accepting SKF's allocated billing adjustment two as a direct adjustment to normal value; and (2) the adjustments were supported by substantial evidence. SKF takes no position on Torrington's allegation of clerical errors.

*Held:*

Torrington's USCIT 56.2 motion is denied in part and granted in part. This case is remanded to Commerce to correct the clerical errors in the computer program that calculates SKF's dumping margins.

Dated: August 18, 2000

*Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, William A. Fennell, Geert De Prest and Lane S. Hurewitz) for Torrington.*

*David W. Ogden, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Velta A. Melnbrencis, Assistant Director); of counsel: Arthur D. Sidney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.*

*Steptoe & Johnson LLP (Herbert C. Shelley and Alice A. Kipel) for SKF.*

*Grunfeld, Desiderio, Lebowitz & Silverman LLP (Max F. Schutzman and Andrew B. Schroth) for Fag Kugelfischer Georg Schafer AG and Fag Bearings Corporation.*

## OPINION

TSOUICALAS, *Senior Judge*: Plaintiff, The Torrington Company (“Torrington”), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration’s (“Commerce”) final determination, entitled Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews (“Final Results”), 64 Fed. Reg. 35,590 (July 1, 1999). Defendant-intervenors, SKF USA Inc. and SKF GmbH (collectively “SKF”), oppose Torrington’s motion.

Specifically, Torrington claims that Commerce erred in: (1) accepting direct price adjustments that were not tied to SKF’s sales; (2) concluding that the adjustments were supported by substantial evidence and did not result in distortion; and (3) making two errors in the computer program that calculates SKF’s dumping margins. SKF contends that: (1) Commerce acted lawfully in accepting SKF’s allocated billing adjustment two as a direct adjustment to normal value (“NV”); and (2) the adjustments were supported by substantial evidence. SKF takes no position on Torrington’s allegation of clerical errors.

## BACKGROUND

This case concerns the ninth review of the antidumping duty order on antifriction bearings (other than tapered roller bearings) and parts thereof (“AFBs”) imported to the United States from Germany during the review period of May 1, 1997 through April 30, 1998.<sup>1</sup> Commerce published the preliminary results of the subject review on February 23, 1999. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Recission of Administrative Reviews*, 64 Fed. Reg. 8790. Commerce published the *Final Results* on July 1, 1999. See 64 Fed. Reg. at 35,590.

The Court granted FAG Kugelfischer Georg Schafer AG and FAG Bearings Corporation’s (collectively “FAG”) consent motion for a judicial protective order on October 10, 1999, after which FAG did not file any additional papers.

## JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

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<sup>1</sup>Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the anti-dumping statute as amended by the Uruguay Round Agreements Act (“URAA”), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995). See *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

## STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an anti-dumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); see *NTN Bearing Corp. of America v. United States*, 24 CIT \_\_\_, \_\_\_, Slip Op. 00-64, at 8-10 (June 5, 2000) (detailing Court's standard of review in antidumping proceedings).

## DISCUSSION

*I. Commerce's Treatment of SKF's Home Market Billing Adjustments as Direct Price Adjustments to Normal Value*

*A. Background*

SKF's home market billing adjustment two ("BILLAD2") represents billing adjustments not associated with a specific transaction. See SKF's Resp. Sec. B Questionnaire (Aug. 28, 1998) (Case No. A-428-801) at 26-28. SKF explained that BILLAD2 included multiple invoices, multiple products or multiple product lines and could not be properly tied to a single transaction. See *id.* at 26. SKF, therefore, used customer-specific allocations to report these adjustments. In reporting BILLAD2, SKF took the sum of all the adjustments for a particular customer number, divided the totals by total gross sales to that customer number and applied the resulting factor "to each reported sale made to that customer number by multiplying the per unit invoice price by the customer-specific billing adjustment factor for the relevant period." *Id.* at 27.

Commerce accepted SKF's BILLAD2 as a direct adjustment to price after determining that SKF acted to the best of its ability in reporting the adjustment on a sale-specific basis and that its reporting methodology was "not unreasonably distortive." *Final Results*, 64 Fed. Reg. at 35,603. Commerce found that SKF's billing adjustments could not be tied to a single specific transaction since they were "part of credit or debit notes issued to the customer that related to multiple invoices, products, or invoice lines," and that "the most feasible reporting methodology that SKF Germany could use was a customer-specific allocation, which is not unreasonably inaccurate or distortive." *Id.* Although it prefers transaction-specific reporting, Commerce realizes that such reporting is "not always feasible, particularly given the extremely large volume of transactions involved in these reviews and the time constraints imposed by the statutory deadlines." *Id.*

Furthermore, Commerce determined that SKF's methodology was "not unreasonably distortive" since there existed "no evidence on the record to indicate that the bearings included in SKF Germany's current allocations vary significantly, either in terms of value, physical characteristics, or the manner in which they were sold." *Id.* Commerce noted that it had verified the reasonableness of SKF's reporting methodology in the 1996-97 review. See *id.*

*B. Contentions of the Parties*

Torrington argues that SFK failed to show that all reported billing adjustment number two values directly relate to the relevant sales. See Torrington's Mem. Support of Mot. J. Agency R. ("Torrington's Br.") at 2. Torrington maintains that the Court of Appeals for the Federal Circuit ("CAFC") has clearly defined "direct" adjustments to price as those that "vary with the quantity sold, or that are related to a particular sale," and Commerce cannot treat adjustments that do not meet this definition as direct. *Id.* at 10 (citing *Torrington Co. v. United States* ("*Torrington CAFC*"), 82 F.3d 1039, 1050 (Fed. Cir. 1996) (citations omitted)). Torrington contends that here Commerce "redefined 'direct' to achieve what Torrington CAFC had previously disallowed" by allowing SKF to report allocated post-sale price adjustments ("PSPAs") if it acted to the best of its abilities in light of its record-keeping systems and the results were not unreasonably distortive. *Id.* at 12.

Furthermore, Torrington maintains that the amendments to the Uruguay Round Agreements Act ("URAA") did not modify the distinction between direct and indirect adjustments established under pre-URAA law such as Torrington CAFC. See *id.* at 13 (citing 19 U.S.C. § 1677a(d)(1)(B), (D) (1994) and § 1677b(a)(7)(B) (1994)). Torrington is not convinced that the Statement of Administrative Action<sup>2</sup> ("SAA") accompanying the URAA contradicts its contentions. See *id.* at 14 (citing SAA at 823-24). Additionally, Torrington acknowledges that the anti-dumping regulations that came into effect on July 1, 1997 apply to this review and maintains that they support its position. See *id.* at 14-15 (citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27,296, 27,416-17 (May 19, 1997); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 63 Fed. Reg. 35,188 (June 29, 1998)).

Torrington acknowledges that this Court has already approved of Commerce's practice as applied under post-URAA law in *Timken Co. v. United States* ("*Timken*"), 22 CIT \_\_\_, 16 F. Supp. 2d 1102 (1998), but asks the Court to reconsider its approval. See *id.* at 16. Torrington complains that *Timken* erroneously held that 19 U.S.C. § 1677m(e) (1994) shifts the burden of proof away from the party who stands to benefit from the claim made, here, SKF. See *id.*

Torrington also contends that even under its new methodology, Commerce's determination was not supported by substantial evidence inasmuch as SKF failed to show that (1) its reporting method did not

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<sup>2</sup>The Statement of Administrative Action ("SAA") represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103-316, at 656 (1994), reprinted in 1994 U.S.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*; see also 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

result in distortion; and (2) it put forth its best efforts to report the information on a more precise basis. *See id.* at 2. Torrington emphasizes that SKF has the burden of showing non-distortion and best efforts, and having failed to do so, must not benefit from the adjustment. *See id.* at 22. Torrington, therefore, requests that this Court reverse Commerce's determination with respect to BILLAD2 and remand the case to Commerce with instructions to disallow SKF's downward home market billing adjustments, but allow all upward home market billing adjustments in calculating NV. *See id.* at 32.

Commerce responds that Torrington erred in relying on *Torrington CAFC* because the case does not stand for the proposition that direct price adjustments may only be accepted when they are reported on a transaction-specific basis. *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. ("Def.'s Mem.") at 7. Rather, the *Torrington CAFC* court "merely overturned a prior Commerce practice . . . of treating certain allocated price adjustments as indirect expenses," *id.* (citing *Torrington CAFC*, 82 F.3d at 1047-51), and "does not address the propriety of the allocation methods" used in reporting the price adjustments in question, *id.* at 8 (quoting *Final Results*, 62 Fed. Reg. at 35,602). Also, contrary to Torrington's assertion, Commerce did not consider *Torrington CAFC* as addressing proper allocation methodologies; rather, Commerce, only viewed *Torrington CAFC* as holding that "Commerce could not treat as indirect selling expenses 'improperly' allocated price adjustments." *Id.* at 9. Commerce notes that pursuant to its new methodology, it does not consider price adjustments to be any type of selling expense, either direct or indirect, and, therefore, Torrington's argument is not only without support, but also inapposite to *Torrington CAFC*. *See id.* Moreover, Commerce asserts that this Court in *Timken* approved of Commerce's modified methodology of accepting respondents' claims for discounts, rebates and other billing adjustments as direct price adjustments, where this Court found the methodology to be consistent with requisites of 19 U.S.C. § 1677m(e). *See id.* at 10-11 (citing *Timken*, 16 F. Supp. 2d at 1108).

Commerce also argues that its treatment of SKF's reported home market billing adjustments was supported by substantial record evidence and otherwise in accordance with law because it is consistent with *Timken*, that is, Commerce: (1) "used its acquired knowledge of the respondents' computer systems and databases to conclude that they could not provide the information in the preferred form"; and (2) "scrutinized the respondents' data before concluding that the data were reliable"; and (3) found "that the adjustments on scope and non-scope merchandise did not result in unreasonable distortions." *Id.* at 19.

Additionally, Commerce argues that its findings are supported by substantial evidence. *See id.* at 20. Specifically, Commerce maintains that "SKF could not properly tie the note to a single transaction" and, therefore, properly calculated the adjustments on a customer-specific basis. *Id.* Commerce noted that it had "verified SKF's treatment of the adjustment and granted the adjustment as a direct adjust-



ment to price during the sixth and eighth reviews of AFBs” and found that it was not unreasonably distortive, that is, SKF did not favor out-of-scope merchandise over in-scope merchandise. *Id.* at 21-22.

With respect to Torrington’s argument that SKF did not carry the burden of proving its entitlement to the adjustment, Commerce responded that it does not require a party to “‘prove a negative’ or demonstrate what the amount of the expense or price adjustment would have been if transaction-specific reporting had been used.” *Id.* at 22-23. Moreover, there was no reason to suspect any distortion or manipulation in the ninth review. *See id.* at 24. Commerce maintains that Torrington is mistaken in its contention that SKF failed to substantiate that it acted to the best of its ability to report the adjustment on a transaction-specific basis. *See id.* at 25. Specifically, Commerce argues that it would be unreasonable to expect SKF to modify its accounting system and generate more precise data when Commerce has made the “reasonable determination that, given the large number of sales, and the manner in which the billing adjustment was granted, customer-specific allocations were reasonable.” *Id.* at 25-26.

SKF concurs with Commerce’s position. SKF contends that in *Timken* this Court properly stated that Commerce’s pre-URAA treatment of allocated PSPAs “does not preclude the agency from changing its policy, nor does it preclude the Court from reconsidering, in view of the Uruguay Round amendments to the statute, its approval of Commerce’s prior practice.” SKF’s Br. Response to Torrington’s 56.2 Mot. J. Agency R. (“SKF’s Br.”) at 11. SKF also maintains that “[a]s a matter of law, this Court’s reliance on 19 U.S.C. § 1677m(e) was correct and the same reasoning should continue to be applied in this case.” *Id.* SKF contends that the holding of *Torrington CAFC* does not answer the issue in the instant case and, moreover, that case was decided under pre-URAA law. *See id.* at 18-19. Furthermore, SKF argues that subsequent changes in the law, that is, § 1677m(e) and the SAA, support its position and cannot be ignored. *See id.* at 20. SKF also contends that substantial record evidence supports Commerce’s conclusions. *See id.* at 30. SKF maintains that the record demonstrates that SKF has satisfied each of the requirements of § 1677m(e). *See id.* Moreover, Torrington only takes issue with respect to one of the requirements, specifically, that “the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority . . . with respect to the information.” *Id.* at 30-31. SKF responds to Torrington’s contention by arguing that Commerce reasonably concluded that SKF acted to the best of its ability and that its methodology was not unreasonably distortive. *See id.* at 31.

SKF contends that its inability to report the adjustments on a more specific basis results from the nature of the adjustment and, moreover, it would be unreasonable to expect SKF to alter its dealings with its customers to fit Torrington’s conception of the antidumping reporting requirements. *See id.* at 39. Finally, SKF argues that the same

methodology used in the subject review was used in previous reviews where no distortion was found and, furthermore, there is no evidence of distortion in the subject review. *See id.* at 40.

### C. Analysis

The Court notes that this issue has been decided in *Torrington Co. v. United States* (“*Torrington CIT*”), 24 CIT \_\_, 100 F. Supp. 2d 1102 (2000), *Timken* and, most recently, *NTN Bearing*, 24 CIT at \_\_, Slip Op. 00-64, at 83-101. The Court adheres to its previous decisions, applying the analysis in *NTN Bearing* to the instant case.

The Court disagrees with *Torrington* that *Torrington CAFC* dictates that direct price adjustments may only be accepted when they are reported on a transaction-specific basis. Rather, as Commerce correctly stated, the Court notes that *Torrington CAFC* “does not address the propriety of allocation methods but rather holds that [Commerce] may not treat direct price adjustments as if they were indirect selling expenses.” *Final Results*, 64 Fed. Reg. at 35,602. The Court further notes that *Torrington CAFC* was decided under pre-URAA law, that is, it did not take into consideration the new statutory guidelines of 19 U.S.C. § 1677m(e). Moreover, the Court acknowledged in *Timken* that although (1) “Commerce treated rebates and billing adjustments as selling expenses in preceding reviews under pre-URAA law,” and (2) “previously decided that such adjustments are selling expenses and, therefore, should not be treated as adjustments to price,” the Court nevertheless determined that this did not “preclude Commerce’s change in policy or this Court’s reconsideration of its stance in light of the newly-amended antidumping statute [(that is, 19 U.S.C. § 1677m(e))].” 16 F. Supp. 2d at 1107.

Indeed, the Court approved in *Timken* Commerce’s modified methodology of accepting claims for discounts, rebates and other billing adjustments as direct price adjustments to NV, *see id.* at 1107-08, and reaffirmed its decision in *Torrington CIT*. Specifically, in *Timken*, the Court reasoned that “[n]either the pre-URAA nor the newly-amended statutory language imposes standards establishing the circumstances under which Commerce is to grant or deny adjustments to NV for PSPAs.” 16 F. Supp. 2d at 1108 (citing *Torrington CAFC*, 82 F.3d at 1048). The Court, however, noted that 19 U.S.C. § 1677m(e) “specifically directs that Commerce shall not decline to consider an interested party’s submitted information if that information is necessary to the determination but does not meet all of Commerce’s established requirements, if the [statute’s] criteria are met.” *Id.* The Court, therefore, approved of Commerce’s change in methodology, “as it substitutes a rigid rule with a more reasonable method that nonetheless ensures that a respondent’s information is reliable and verifiable. This is especially true in light of the more lenient statutory instructions of subsection 1677m(e).” *Id.*

Accordingly, the Court in *Timken* upheld Commerce’s decision to accept Koyo’s billing adjustments and rebates, “even though they were

not reported on a transaction-specific basis and even though the allocations Koyo used included rebates on non-scope merchandise.” See *id.* at 1106. Similarly, in *Torrington CIT*, the Court followed the rationale of *Timken* and upheld Commerce’s determination to accept respondents’ rebates even though they were reported on a customer-specific rather than transaction-specific basis and even though the allocation methodology used included rebates on non-scope merchandise. See 24 CIT at \_\_\_, 100 F. Supp. 2d at 1107-08.

The Court finds that Commerce’s decision to accept SKF’s reported home market billing adjustments was supported by substantial evidence and was fully in accordance with the post-URAA statutory language and the SAA’s statements. The record clearly indicates that Commerce properly used its acquired knowledge of SKF’s billing practices to conclude that it could not provide the information in the preferred form and, moreover, properly scrutinized SKF’s reported billing adjustments before concluding that the adjustments were reliable. See *Final Results*, 64 Fed. Reg. at 35,603. Commerce also properly accepted SKF’s allocation methodology even though the adjustments related to multiple invoices, products or product lines since there was no evidence “that the bearings included in . . . [the] allocation var[ie]d significantly, either in terms of value, physical characteristics, or the manner in which they were sold,” indicating that the allocations were not unreasonably distortive. *Id.*

Moreover, the record and the *Final Results* demonstrate that the requirements of 19 U.S.C. § 1677m(e), as noted earlier, were satisfied by the respondents. First, SKF’s reported adjustments were submitted in a timely fashion. See § 1677m(e)(1). Second, the information SKF submitted was verifiable, as shown in prior reviews that utilized the identical treatment of BILLAD2. See § 1677m(e)(2). Third, SKF’s information was not so incomplete that it could not serve as a basis for reaching a determination. See § 1677m(e)(3). Fourth, SKF demonstrated that it acted to the best of its abilities in providing the information and meeting Commerce’s new reporting requirements. See § 1677m(e)(4). Finally, the Court finds that there was no indication that the information was incapable of being used without undue difficulties. See § 1677m(e)(5).

Commerce’s determination with respect to SKF was also consistent with the SAA. The Court agrees with Commerce’s finding in the *Final Results* that given the extremely large volume of transactions and time constraints imposed by the statute, SKF’s reporting and allocation methodologies were reasonable. This is consistent with the SAA directive under § 1677m(e), which provides that Commerce “may take into account the circumstances of the party, including (but not limited to) the party’s size, its accounting systems, and computer capabilities.” SAA at 865. Thus, the Court finds that Commerce properly considered the ability of SKF to report BILLAD2 on a more specific basis.

Accordingly, the Court concludes that Commerce’s acceptance of SKF’s reported billing adjustments as direct adjustments to NV is

supported by substantial evidence and fully in accordance with law.

## II. Clerical Errors

Torrington contends that, contrary to Commerce's intent, the computer program used to calculate SKF's dumping margins erroneously failed to exclude further manufactured sales from the antidumping calculations. *See* Torrington's Br. at 28 (citing SKF's Preliminary Results Analysis Mem. (Feb. 18, 1999) (Case No. A-428- 801) ("SKF's Preliminary") at 4). Torrington also contends that Commerce erred in failing to exclude sales made outside the period of review from the United States sales database. *See* Torrington's Reply Br. at 11. SKF takes no position on the alleged clerical errors. *See* SKF's Br. at 49.

Commerce agrees that it committed the errors alleged by Torrington. Specifically, Commerce maintains that in *SKF's Preliminary* it had "explained that the United States value added for ball bearings was likely to exceed substantially the value of the imported subject merchandise" and, therefore, Commerce declared that it was excluding sales of further-manufactured merchandise. Def.'s Br. at 30. Due to an error in the computer programming language that failed to include the proper definition of further-manufactured sales, these sales were not excluded from the margin calculation. *See id.* Commerce also admits that it failed to properly exclude SKF's sales made outside the period of review from the United States sales database. *See id.*

The Court has reviewed the record and finds that Commerce did indeed commit the two errors specified in Torrington and Commerce's briefs. *See* Torrington's Br. at 28-31; Def.'s Br. at 30. The Court, therefore, remands this matter to Commerce to correct the errors.

## CONCLUSION

This case is remanded to Commerce to: (1) exclude SKF's further-manufactured sales from the margin calculation for constructed export price sales; (2) exclude SKF's sales made outside the review period from the United States sales database; and (3) recalculate SKF's dumping margins. Commerce's final determination is affirmed in all other respects.

NICHOLAS TSOUCALAS  
*Senior Judge*

Dated: August 18, 2000  
New York, New York

(Slip Op. 00-103)

FORD MOTOR COMPANY, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 92-03-00164

Plaintiff, Ford Motor Company (Ford), challenges the U.S. Customs Service's (Customs) assessment of duties at the rate of twenty-five percent *ad valorem* on eleven entries of foreign engines and transmissions imported and installed in trucks by plaintiff in a Foreign Trade Subzone. Plaintiff seeks to recover \$5,000,000 in allegedly excess duties paid to Customs, asserting clerical errors committed by plaintiff's employee in designating the status of the entries at issue as "Non-Privileged Foreign" instead of "Privileged Domestic" and in failing to pay timely the required duties owed caused plaintiff to pay more duties than were actually due. Plaintiff also asserts Customs abused its discretion by extending liquidation of the eleven entries at issue in this case on three separate occasions pursuant to 19 U.S.C. §1504(b)(1) (1982), and, therefore, the eleven entries should be deemed liquidated by operation of law, "as entered," one year after the dates of entry. Alternatively, plaintiff maintains the entries should be deemed liquidated after the first extension expired, or, alternatively, after the second extension expired. Defendant, United States, maintains plaintiff's failure to designate appropriately the status of the entries at issue and to pay timely the required duties owed are not remediable as "clerical errors," and Customs did not abuse its discretion in extending the liquidations.

The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) vacated this Court's grant of defendant's motion for summary judgment and remanded the case for further proceedings because the Federal Circuit found genuine issues of material fact prevented a determination on summary judgment of whether Customs abused its discretion in extending the time for liquidation and whether Ford committed correctable "clerical error." A bench trial followed.

*Held:* Customs did not abuse its discretion in extending liquidation on three separate occasions pursuant to 19 U.S.C. §1504(b)(1), and, therefore, the eleven entries at issue are not deemed liquidated by law, "as entered." Further, plaintiff's failure to designate appropriately the status of the entries and to pay timely required duties owed are not "clerical errors" remediable under 19 U.S.C. §1520(c)(1) (1982). Therefore, judgment is entered for the defendant.

Dated: August 21, 2000

*Coudert Brothers* (Steven H. Becker, Paul A. Horowitz, and Scott D. Shauf), New York, N.Y.; *Stein Shostak Shostak & O'Hara* (S. Richard Shostak), Los Angeles, CA; *Ford Motor Company* (C. Harry Gibson), Dearborn, MI, for plaintiff.

*David W. Ogden*, Assistant Attorney General of the United States; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Amy M. Rubin*); *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of Counsel, for defendant.

## OPINION

CARMAN, *Chief Judge*: Plaintiff, Ford Motor Company (Ford), challenges the U.S. Customs Service's (Customs) assessment of duties at the rate of 25% *ad valorem* on eleven entries of foreign engines and transmissions imported and installed in trucks by plaintiff in a Foreign Trade Subzone (FTSZ) in Louisville, Kentucky. Plaintiff seeks to recover \$5,000,000 in allegedly excess duties paid to Customs, asserting clerical errors committed by plaintiff's employee in designating the status of the entries at issue as "Non-Privileged Foreign" (NPF) instead of "Privileged Domestic" (PD) and in failing to pay timely required duties owed caused plaintiff to pay more duties than were actually due. Plaintiff also asserts Customs abused its discretion in extending liquidation of the eleven entries at issue in this case on three separate occasions pursuant to 19 U.S.C. § 1504(b)(1) (1982), and, therefore, the eleven entries should be deemed liquidated by operation of law, "as entered," one year after the dates of entry. Alternatively, plaintiff maintains the entries should be deemed liquidated after the first extension expired, or, alternatively, after the second extension expired. Defendant, United States, maintains plaintiff's failure to designate appropriately the status of the entries at issue and to pay timely the required duties owed are not remediable as "clerical errors," and Customs did not abuse its discretion in extending the liquidations.

This case comes before this Court on remand from the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). See *Ford Motor Co. v. United States*, 157 F.3d 849 (Fed. Cir. 1998) (*Ford II*). The Federal Circuit vacated this Court's grant of defendant's summary judgment motion and remanded the case for further proceedings because it found genuine issues of material fact prevented a determination on summary judgment of whether Customs abused its discretion in extending the time for liquidation and whether Ford committed correctable "clerical errors."<sup>1</sup> This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

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<sup>1</sup> This Court notes the Federal Circuit in its opinion remanding this case for trial stated, "Customs has questioned whether Ford's record keeping system was adequate. Ford argues that Customs did not timely raise the issue below, but the trial court declined to address it. This court leaves it to the trial court on remand to pass on the relevance and timeliness of this point." *Ford Motor Co. v. United States*, 157 F.3d 849, 863 n.5 (Fed. Cir. 1998) (*Ford II*) (citations omitted). The parties agreed in the Pretrial Order signed by all parties on January 26, 2000, that the only two issues before this Court on remand are (1) whether Customs abused its discretion by extending the time for liquidation of the subject imports pursuant to 19 U.S.C. § 1504(b) (1982) on three separate occasions; and (2) whether the failure of Ford's employee to check the status designation box on Customs Forms 214 and deposit duties on the subject engines and transmissions constituted clerical errors which are correctable under 19 U.S.C. § 1520(c)(1) (1982). (See Pretrial Order, Sched. F-1.) Thus, this Court does not consider the adequacy of Ford's record keeping system on remand. For the reasons stated above, this Court also does not consider whether the errors qualify as "inadvertence." *Ford II*, 157 F.3d at 861.



I. BACKGROUND<sup>2</sup>A. *Louisville Foreign Trade Subzone*

In the early 1980s, Ford applied to establish a Foreign Trade Subzone at its Louisville, Kentucky assembly plant which manufactured cars (Bronco IIs) and trucks (Rangers). Ford informed Customs that it intended to use the FTSZ to assemble imported engines and transmissions into cars and trucks. Ford's rationale for establishing the FTSZ was to take advantage of Customs's laws and regulations that would enable Ford to minimize the duties paid on imported engines and transmissions assembled into cars and trucks. A FTSZ, though located in the United States, receives treatment under Customs's laws as a territory outside of the United States. *See generally* 15 C.F.R. § 400.1(c) (1992). At a FTSZ, an importer has the "choice of paying duties either at the rate applicable to the foreign material in its condition as admitted into a zone, or if used in manufacturing or processing, to the emerging product." *Id.* During the relevant times for this case, the duty rate for a completed car was only 2.6% *ad valorem*. The duty rate for imported engines and transmissions was 3.3% *ad valorem*. The duty rate for completed trucks was much higher—25% *ad valorem*. Thus, by locating its Louisville plant in a FTSZ, Ford could pay the duty rate of 2.6% *ad valorem* (for completed cars) on the imported engines and transmissions for cars and could continue to pay the duty rate of 3.3% *ad valorem* on the imported engines and transmissions for trucks.

To qualify for FTSZ treatment, the regulations required Ford to conduct its operations in a specific manner. To take advantage of the lower rate applicable to completed cars, Ford had to select "Non-Privileged Foreign" status on a Customs Form 214 (CF 214) when the engines and transmissions to be assembled into cars entered the FTSZ. When NPF status was selected for the engines and transmissions for cars, Ford could defer payment of duties on the car parts until it had assembled them into completed cars and thereby capture the rate for completed cars, rather than for car parts. On the other hand, because the duty rate applicable to completed trucks was substantially higher than the duty rate applicable to engines and transmissions for trucks which entered as parts, to take advantage of the lower duty rate applicable to engines and transmissions for trucks, Ford had to select "Privileged Domestic" status on a CF 214 when the parts destined for use in trucks entered the FTSZ. By selecting PD status, Ford was to pay the lower component duty rate before the engines and transmissions entered the FTSZ and, thus, reduce the duties paid on finished trucks. For either of these two designations, payment needed to accompany Customs Form 7501 (CF 7501), which identifies merchandise entering the commerce of the United States. Thus, to successfully operate the FTSZ, Ford had to identify each part entering the FTSZ as either a

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<sup>2</sup> The facts cited in this section are based largely on the statements of uncontested facts filed with this Court as Schedule C attached to the Pretrial Order. (See Pretrial Order, Sched. C.)

car part or a truck part, and then, based on that identification, select the correct FTSZ status and pay duty at the appropriate time and rate.

Ford appointed Elma D. (Moe) Tullock, one of Ford's traffic expeditors (also known as parts chasers), to be the Louisville FTSZ Coordinator (also referred to as the FTSZ Agent and/or FTSZ Representative). As part of his duties as the FTSZ Coordinator, Tullock was responsible for completing the Customs's forms necessary for the daily operations of the FTSZ.

*B. Entries Made Between December 1985 and February 1986*

Ford's Louisville FTSZ operated for less than three months. In the beginning of January 1986, Tullock began to experience difficulty handling certain Customs aspects of the Louisville FTSZ. From December 30, 1985, to February 7, 1986, Ford incorrectly entered NPF-designated engines and transmissions contained in completed trucks at the parts rate instead of the rate applicable to completed trucks. For the entries at issue, Tullock checked the NPF box on all the CF 214s and paid no duty up front. Tullock described each entering part as "transmissions for trucks," "transmissions for autos," "engines for trucks," or "engines for autos." Each Customs's form set forth a 2.6% rate for the car parts and a 3.3% rate for the truck parts. The eleven entries were replete with errors. Product descriptions, duty rates, and tariff item numbers were incorrect. In mid-February 1986, Ford ceased operations of the FTSZ. In that time, only the subject eleven entries were entered from the Louisville FTSZ into the commerce of the United States.

At some point in late January or early February 1986, Ford met with Customs Import Specialist Richard McNally in Ohio and disclosed the errors made. Ford representatives requested that McNally permit Ford to change the zone status of the truck parts to PD. In June 1986, McNally informed Ford that he could not change the zone status of the truck parts.

In June or July 1986, McNally re-computed the duties due by changing the duty rate applicable to the engines and transmissions in trucks, which had been entered at a 3.3% *ad valorem* rate, to the truck rate of 25% *ad valorem*. In July 1986, McNally prepared an Importer's Premises Visit-Significant Importation Report. During the same month, McNally also prepared a Memorandum of Information Received for the Customs Office of Enforcement/Investigation. Customs began a civil fraud investigation of the entries at issue under 19 U.S.C. § 1592 (1982) in August 1986. The investigation continued through at least March 1990.

### C. Customs's Extensions and Liquidations and Ford's Protest

The eleven entries at issue were liquidated on December 1, 1989, after three one-year extensions<sup>3</sup> at the 25% duty rate for finished trucks.<sup>4</sup> In response to plaintiff's interrogatories, defendant stated the basis for the issuance of the three successive one-year extensions was that "there was an ongoing investigation regarding an alleged violation under 19 U.S.C. § 1592." (Pretrial Order, Sched. C, Undisputed Facts, & 48.) Defendant also advised in response to plaintiff's interrogatories there were two outstanding appraisal and classification issues: (1) a memorandum from Customs Headquarters requested that liquidation of entries containing Tariff Schedules of the United States (TSUS) 807.00 claims from all Ford FTSZ which received electrical products manufactured in a certain location be extended<sup>5</sup>; and (2) Customs was concerned specifically that Ford had improperly classified cars as trucks.

The final additional duty assessed on the eleven entries was more than \$5,000,000. Two of the eleven entries were reliquidated in February 1990 to make technical corrections. In the liquidations, Customs accepted Ford's 807.00 claims. Ford timely protested the liquidations and paid the additional duties assessed.

With this background in place, the Court now turns to the parties' contentions and the Court's discussion of the issues. The factual determinations appearing in the discussion section constitute findings of fact by the Court but have been deferred in order to achieve an orderly presentation of the issues.

## II. CONTENTIONS OF THE PARTIES

### A. Plaintiff

Ford argues the eleven entries at issue should be deemed liquidated by operation of law, "as entered," one year after the dates of entry pursuant to 19 U.S.C. § 1504(a) (1982) because Customs did not have a valid basis for extending liquidation under 19 U.S.C. § 1504(b)(1). Alternatively, Ford maintains, at the very least, the entries should be deemed liquidated after the first extension expired, or, in the alternative, after the second extension expired.

Specifically, Ford argues Customs failed to show "information needed for the proper appraisal or classification of the merchandise [was] not available to the appropriate customs officer," as required by subsection (b)(1) of 19 U.S.C. § 1504, the statutory basis upon which Cus-

<sup>3</sup> The parties stipulated at trial that the extensions at issue occurred on or about October 22, 1986, mid-to-late October 1987, and on or about October 18, 1988. See Trial Transcript (Trial Tr.) at 776-77.

<sup>4</sup> In *Ford Motor Co. v. United States*, 979 F. Supp. 874 (CIT 1997) (*Ford I*), Ford challenged whether Customs had actually sent the notices of extension to Ford as required under 19 U.S.C. § 1504(c) (1982). This Court granted summary judgment in favor of Customs. See *Ford I*, 979 F. Supp. at 886-90. Ford did not contest this ruling on appeal. See *Ford II*, 157 F.3d at 854 n.3. Therefore, this issue is not before this Court on remand.

<sup>5</sup> Four of the eleven entries at issue in this case claimed treatment under Item 807 of the Tariff Schedules of the United States (TSUS) (American goods returned).

toms relies in granting the three extensions. Ford contends no evidence adduced at trial shows McNally needed more information for appraisement or classification of the entries at issue.<sup>6</sup> First, Ford contends, McNally's Significant Importation Report dated July 1986 indicates McNally had the eleven entries in his possession and correspondence and documents from Ford. Further, McNally testified at trial he could not recall requesting additional documents or information from Ford or Customs.

Second, Ford contends when asked at his deposition in 1994 whether he expected additional classification and value information after his July 1986 report, McNally stated he could not remember but that he must have needed more information because he did not liquidate the entries. Ford points out, as did the Federal Circuit, that such reasoning is circular and does not help Customs show it acted reasonably. *See Ford II*, 157 F.3d at 856.

Third, although McNally stated at trial he referred the matter to the Office of Enforcement for "more information" and because of the amount of duty involved, Ford contends the Significant Importation Report, which indicates why McNally referred the matter, is silent as to any need for information. When asked at trial, McNally could not recall the reason for the referral. Moreover, Customs Special Agent George F. Fritz, Jr., who reviewed the Memorandum of Information Received with McNally, testified he understood the Memorandum to be a request for the office to investigate whether there was any culpability on Ford's part.

Further, even though McNally stated one of the reasons he did not liquidate the entries was because it was the policy of Customs to withhold liquidations on entries under referral, McNally could not recall any other reasons for extending the liquidation. Ford argues any presumption of correctness that attaches to the actions of Customs officers under 28 U.S.C. § 2639(a)(1) (1994) is defeated by McNally's own testimony. Further, Ford contends, defendant's argument that McNally had many concerns about the entries does not help because there is no evidence that the concerns translated into information needed for classification or appraisal.

Moreover, according to Ford, the two Customs agents who conducted the § 1592 investigation confirmed McNally neither sought nor expected information needed to classify or appraise the merchandise at issue as both Special Agent Fritz and Special Agent Charles David Kyle, Jr. testified that McNally never asked them to obtain any information or documentation. Additionally, although Hilton B. Duckworth, the Cincinnati Port Director and McNally's supervisor, testified as to

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<sup>6</sup> At trial, Ford produced six witnesses: Richard McNally, George F. Fritz, Jr., Charles David Kyle, Jr., William Kuchenbrod, Allen Moody, and Elma D. (Moe) Tullock. The government produced three additional witnesses: Robert J. Cortesi, Hilton B. (Bernie) Duckworth, and Clinton Littlefield. In addition, both parties introduced excerpts from the deposition of the late Lars Anderson.

his recollection of additional reasons liquidation was extended, including to verify the accuracy of information in McNally's possession, Duckworth testified that he was not involved in making the decision to extend liquidation and any involvement he might have had in approving the decision likely occurred after the decision was made. Ford also asserts no testimony at trial states how the desire to "verify" information translates into a need for more information. Moreover, Ford asserts the evidence shows Duckworth could not recall any instance in which McNally ever told Duckworth that he needed additional information from the agents or indicated he expected to receive such information. According to Ford, McNally's silence to his supervisor belies any presumption he needed information.

Ford also contends Clinton Littlefield's, the Assistant District Director for Commercial Operations in Cleveland, citation of a pending 807 audit fails to support the reasonableness of the extensions. As the audit only covered four of the eleven entries and as it was concerned with possible commingling of U.S. and foreign parts assembled into radios entered by Ford Electronics & Refrigeration Corporation (FERCO) in Landsdale, Pennsylvania, the 807 audit could not affect the liquidation of the Louisville entries in this case.

Ford contends the primary reason given by McNally for extending the liquidations because it was the policy of Customs to withhold liquidation while a § 1592 investigation was pending also fails to satisfy the statutory requirement. Ford argues to satisfy the statutory standard, Customs must establish, in accordance with the Federal Circuit in *Ford II*, that the investigation was "reasonably expected to produce information about 'appraisement' and 'classification.'" *Ford II*, 157 F.3d at 856. Ford argues a "reasonable expectation" requires proof of both a subjective reasonable expectation as well as an objective reasonable expectation. Thus, Ford contends, McNally must have had both a subjective expectation that the fraud investigation would produce information needed for classification or appraisement and that expectation must have been objectively reasonable. Ford argues, however, that McNally did not tell his supervisor that he needed information, nor did he seek or request information of any kind from the agents. Thus, according to Ford, McNally's own conduct demonstrates he had no "expectation" that the investigation would produce classification or appraisement information. Though Ford acknowledges McNally admitted that with regard to any investigation one cannot know with certainty what the investigation will uncover, Ford contends the issue is not a theoretical question but rather a practical one whether McNally himself had a reasonable expectation. Ford asserts the evidence at trial does not demonstrate such an expectation.

Additionally, Ford argues, even if the Court were to find Customs needed additional information and initially had reason to expect that the § 1592 investigation would produce information needed for appraisement or classification of the merchandise at issue, the extensions particularly the second and third extensions cannot be

sustained because Customs took an unreasonable amount of time to seek and process the information and complete the investigation. Specifically, Ford contends the evidence at trial demonstrates there were long stretches of time in which no work was performed on the Ford matter. First, Ford points to evidence concerning the length of the fraud investigation which began in August 1986 and lasted at least through March 1990. During the first few months, from August 1986 to November 1987, the case was assigned to Special Agent Fritz. While there was activity on the case from August 1986 through March 1987, Fritz admits there was no work performed on the case from March until the case was reassigned on November 19, 1987. Thus, the case remained idle for seven and one-half months before the second extension in October 1987. Moreover, though Fritz was assigned to the Cincinnati Airport for thirty days in the fall of 1986, opened the Bowling Green office for thirty days during the summer of 1987, and was on sick leave for in November 1987, no evidence explains adequately Fritz's neglect of the file from March through November. The neglect, Ford contends, does not justify the 1987 extension.

Once the file was transferred to Special Agent Kyle and after Kyle reviewed the file in early 1988, Kyle testified all that needed to be done was for McNally to determine the appropriate rate of duty and provide Kyle with that information. Though Kyle testified he had a heavy workload at the time, Ford points out he stated it was not his workload which impeded him. Kyle testified that for some seven or eight months in 1988 McNally did no work on the Ford matter. Moreover, Ford contends, notes from a February 21, 1989, meeting show McNally had not calculated the duty loss. McNally was supposed to rectify discrepancies in figures on various documents but had known about these needs for several years. Ford contends McNally did not provide an explanation at trial on why it took him so long to rectify the discrepancies. Kyle even took the unusual step, Ford argues, of writing McNally to request the information after months of delay. Thus, according to Ford, as no explanation was provided regarding why it took McNally three years to rectify such discrepancies, Customs should not be permitted to justify the October 1988 extension.

Ford also argues McNally's delay was not justified with regard to any 807 issues. According to Ford, evidence showed that in January 1986 Tullock sent McNally information concerning 807.00 values of imported engines and transmissions. At a meeting in February 1987, McNally's notes indicate 807 information was on file and that McNally would send a request for further information regarding 807 if necessary. No such request was sent by McNally. The unreasonableness of McNally's failure over a two year period to request additional 807 information is, according to Ford, confirmed when in late 1989 based on the same information he had in February 1987, McNally concluded there was no 807 problem. Thus, Ford argues, Customs should not be permitted to justify the extensions on the grounds that the investigation was continuing or that necessary information had not been re-



viewed.

Ford additionally argues the evidence adduced at trial establishes that, despite being properly trained and supervised, Tullock failed to follow clear, complete, and binding instructions, and thus committed correctable “clerical errors” under 19 U.S.C. § 1520(c)(1) (1982). Ford contends a subordinate commits clerical error when he “is given binding instructions *on particular aspects of a task*, no duty devolves upon him to exercise discretion or judgment *in carrying out those aspects*,” and he “acts contrary to those instructions.” (Pl.’s Post-Tr. Br. at 25 (quoting *Ford II*, 157 F.3d at 860).) Ford argues the record firmly establishes Tullock was given clear, complete, and binding instructions to designate truck parts as PD and to pay duty on those parts before they entered the FTSZ and to designate car parts as NPF and to pay duty on those parts as the assembled cars exited the zone. Instructions were provided in writing (*e.g.*, Ford’s FTSZ manual and other materials Tullock received) and orally and were reviewed with Tullock by Lars Anderson, Ford Headquarter’s staff person who coordinated the FTSZ program. Ford cites Tullock’s contemporaneous memorandum dated January 17, 1985, as proof Tullock received and understood those instructions. Ford also cites Tullock’s testimony at trial that he communicated his understanding of the instructions to Anderson verbally as proof that he understood them. Although some truck and car parts at the plant were interchangeable, Ford argues this issue is irrelevant, as Ford Headquarters predetermined the destination of all parts when it created the daily material records report. Thus, all Tullock had to do was to follow the instructions and designate the parts destined for trucks as PD and pay duty up front and designate the parts destined for cars as NPF and pay duty when the assembled cars exited the zone.

Ford additionally argues Tullock had no discretion to deviate from the clear, binding instructions. For example, Ford argues Tullock had no discretion regarding the designation of zone status, the payment of duties on car and truck parts, the determination of NPF or PD status, the determination of how to make an entry, or the determination of which engine or transmission went into cars or trucks. As Tullock was given binding instructions regarding the designation of zone status and the timing of payments, no duty devolved on him to exercise original thought or judgment in assigning import status to truck parts or in determining when to make payments. As Tullock acted contrary to the binding instructions, his errors in designating truck parts PD and in failing to pay timely the duty on those parts were “clerical errors.”

Ford argues Tullock was also well-trained. According to Ford, the record establishes Anderson was in frequent contact with Tullock. Tullock visited other FTSZs, such as the FTSZs in Wayne, Michigan and Wixom, Ohio and saw first-hand how they operated. Further, Ford points out, Anderson reviewed documents with Tullock and visited Tullock in Louisville on numerous occasions. Tullock could con-

tact Anderson or Moody, Supervisor of Ford's Customs Department and overseer of the FTSZ, at any time with questions. Ford argues no special training was necessary, as the government contends, regarding how Tullock needed to handle interchangeable parts as Ford Headquarters predetermined how many parts were needed for what vehicles, and Tullock had no authority to deviate from those determinations. Thus, Ford argues, the record demonstrates Tullock was adequately trained.

Ford also asserts Tullock was well-supervised. Ford points to the evidence at trial that Anderson was in frequent contact with Tullock, thereby making the fact that William Kuchenbrod, Tullock's parts chaser supervisor, was not trained in FTSZ matters irrelevant. Further, Ford contends, Anderson met with Tullock at Ford Headquarters and visited Tullock at the Louisville plant. Thus, according to Ford, Tullock was also well-supervised. Applying these facts to the legal standard for "clerical error" as enunciated by the Federal Circuit, Ford argues, the only conclusion is that Tullock's errors constituted "clerical errors" under the statute.

#### *B. Defendant*

Defendant argues evidence at trial shows Customs, in its discretion, determined to extend liquidation of the eleven entries at issue while it waited for further information it believed necessary to ensure the correct classification and appraisement of the imported merchandise at issue. In order for Ford to prove Customs abused its discretion, the government argues, Ford must eliminate "all possible grounds" for the three extensions and establish that the relevant Customs officials extended the liquidations "with actual knowledge that no basis exist[ed] for so doing." (Def.'s Pre-Tr. Br. at 4 (quoting *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 768 (Fed. Cir. 1993)).) The government argues Ford has not met this burden.

The government further contends it is entitled to rely on a presumption of regularity that the import specialist properly performed his duties, and the government is entitled to a statutory presumption that Customs's decisions to extend liquidation were correct. The burden of proving otherwise is on Ford. These presumptions, the government asserts, are not defeated by a Customs officer's failure to recall specific information, as Ford appears to claim in its papers.

The government argues McNally was waiting for information he reasonably believed could affect the classification or appraisement of the merchandise. McNally testified he did not remember specific details regarding the entries, but he authenticated the content of documents he wrote or signed. The documents he authenticated, the government contends, indicate a number of concerns McNally had regarding the entries related to the classification or appraisement of the merchandise at issue. The government asserts evidence at trial shows areas of concern included, but were not limited to:

how the FTZ was set up, what articles entered and left the FTSZ, the proper tariff provisions for the merchandise leaving the zone, the method used by Ford to account for controlled merchandise in the zone, calculation errors on the entry papers, Ford's "807" claims on some of the entries, the basis for the selection of "NPF" status . . . why completed vehicles were entered as parts, and the amount of duty loss attributable to these entries.

(Def.'s Post-Tr. Br. at 4.) Accordingly, further information was needed from Ford for the proper classification or appraisal of the merchandise at issue.

The government attempts to refute Ford's argument that because the Memorandum of Information Received and Significant Importation Report state the matter was referred for investigation because a lot of duty was at stake, the matter could not have been referred because of a need for additional classification or appraisal information. The government argues several witnesses testified that the documents were not comprehensive. Moreover, the government argues, evidence at trial demonstrates that a significant potential loss of revenue arising because of apparent substantive errors would "be a signal that something is amiss with the information provided for purposes of classifying and/or appraising the entered merchandise." (Def.'s Reply to Pl.'s Post-Tr. Br. at 3.)

The government also disputes Ford's characterization of McNally's lack of recollection regarding asking for information from Fritz or Kyle. According to the government, Fritz stated he did not recall any request for specific information by McNally, and Kyle stated to the best of his knowledge, McNally was not waiting for information. The government essentially argues Ford's characterizations of the testimony are misleading.

The government also asserts Ford's circularity argument is without merit. Ford introduced at trial evidence of deposition testimony of McNally wherein he testified although he could not remember any specific information he was waiting for after he referred the matter to investigation, he must have been waiting for additional information because he referred the matter for investigation, and the entries were not liquidated. The government contends Ford's focus on this aspect of McNally's testimony is misplaced. Although the government admits that at first blush such reasoning may appear circular, it is, in effect, logical. As McNally had been an import specialist for thirty years, the government argues, "it would be inconceivable that [he] did not know the existing statutory bases for extending liquidations." (Def.'s Post-Tr. Br. at 4.) Thus, McNally's statement that he must have needed more information by virtue of the fact that the liquidations were extended was merely shorthand for indicating that for as much as he knew the statutory requirements for extending liquidation, the fact that he had extended the liquidations necessarily meant he needed additional information.

The government argues the testimony of Duckworth supports the assertion that the entries remained unliquidated until 1989 because McNally needed more information. The government points to testimony by Duckworth that he required import specialists under his supervision to justify why significant entries remained unliquidated following an anniversary date. Although some of the entries reviewed were immediately liquidated, the remaining entries were those for which the import specialists determined more information was needed. The government contends Duckworth's signature on the referral memorandum indicates he concurred in the decision to refer the entries for investigation knowing that liquidation could be extended only if Customs needed more information to classify or appraise the merchandise properly.

The government also contends although McNally extended liquidation in part because it was Customs's policy to withhold liquidations while a § 1592 investigation was pending, Customs anticipated information could be disclosed regarding the classification or appraisement of the entries at issue as a result of the investigation.<sup>7</sup> For example, the government points to, among other evidence, McNally's testimony at trial that the estimated duties he derived in 1986 could have been changed based on information he might have received prior to liquidation as a result of the investigation.

The government also points to Duckworth's recollection that the entries were extended to verify information needed to classify correctly the merchandise in light of possible fraud and withholding of duties. Although Duckworth testified he could not recall anything about the valuation of the merchandise that would call into question McNally's July 1986 estimated loss of revenue calculation, the government points to Duckworth's testimony that potential fraud in any investigation calls into question all aspects of the importation. Including the veracity of the information provided to Customs for use in classifying and appraising the merchandise. Thus, McNally appropriately withheld liquidation pending results of the investigation.

That McNally ultimately had to liquidate without the benefit of the results of the investigation, the government contends, does not negate the reasonableness of awaiting those results. The government asserts the actual information obtained in the course of an investigation and whether that information would affect the merchandise at issue regarding its classification or appraisement cannot be known until the investigation is complete.

Thus, the government contends, Ford was unable at trial to meet its burden of proof and adduce sufficient evidence to eliminate all possible grounds for the three extensions. As the investigation involved

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<sup>7</sup> The government states in its pre-trial brief that internal information, like that sought by Customs in the fraud investigation, "satisfies the requirement of section 1504(b)(1)." (Def.'s Pretr. Br. at 6 (citing *A Classic Time v. United States*, 942 F. Supp. 589 (CIT 1996) (citing *Detroit Zoological Soc'y v. United States*, 10 CIT 133, 138, 630 F. Supp. 1350, 1356-57 (1986))).) Thus, the government argues, seeking internal information of this kind satisfies section 1504(b)(1)

the classification or appraisal of the imported merchandise and the appropriate Customs official was awaiting information resulting from that investigation, so long as the investigation continued, Customs had a reasonable basis for extending the liquidation periods. Thus, according to the government, Ford cannot demonstrate it is entitled to relief.

Additionally, the government argues, the manner in which the investigation was conducted and the total amount of time consumed were reasonable under the circumstances. Although Special Agent George Fritz, the special agent initially assigned to investigate the Ford entries, undertook investigative activities from the beginning of the investigation in August 1986 through March 1987, Fritz admitted at trial that he did not undertake any additional significant activities on the Ford case between March 4, 1987, and November 19, 1987. The government points out, however, that Fritz explained he had other priorities during that time, including other investigations. Moreover, the government points to Fritz's testimony that when the file was ultimately transferred to the Bowling Green office in November 1987, there was more work to be done on the investigation, including interviewing Ford and Customs personnel.

Additionally, the government cites testimony of Special Agent Kyle, to whom the case was reassigned in the Bowling Green office,<sup>8</sup> which shows as head of the new office, Kyle had responsibility for acquiring new furniture, equipment, and personnel in addition to his normal duties as a special agent. Kyle testified these additional tasks took from one to two years to complete. Kyle further testified it took several months for him to familiarize himself with the Ford file which Kyle confirmed required additional personnel be interviewed to complete the investigation. Although Kyle testified he began having trouble completing his investigation in 1988 because he had not received information from McNally, the government asserts Kyle never formalized or forwarded his requests in writing until after a meeting held on February 21, 1989. Thus, the government notes, there is no indication that any request had been made prior to the February 21 meeting. Under the circumstances, the government contends, the amount of time consumed for the investigation was reasonable.

The reasonableness of the duration of the investigation from the time it was reassigned to Kyle, the government asserts, was reinforced by testimony of Robert Cortesi, the Resident In Charge at U.S. Customs in Cincinnati, Ohio. Cortesi testified that the time gaps between the listed activities in his review reports of Kyle's investigation of the Ford entries were reasonable because the activity in any given

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<sup>8</sup> Robert J. Cortesi, the Resident Agent In Charge at U.S. Customs in Cincinnati, Ohio, testified that the case was reassigned to Kyle in mid-investigation because when the Bowling Green office opened, all investigations that were based in the Western Federal Judicial District of Kentucky were referred to the jurisdiction of the Bowling Green office. See Trial Tr. at 732-33.

case depends on a number of factors, including the activity of the office and other responsibilities of the assigned agent. As part of the time Kyle conducted the Ford investigation was devoted to setting up the Bowling Green office and given the amount of information that had to be reviewed and analyzed in this case, Cortesi confirmed the amount of time consumed by the investigation was reasonable. Thus, the government argues, AFord has not demonstrated that the amount of time consumed was unreasonable or that the investigation could have or should have concluded sooner.” (Def.’s Reply to Pl.’s Post-Tr. Br. at 7.)

Additionally, the government contends Ford’s failure to designate the imported parts as PD and to deposit duties before the merchandise entered the Louisville FTSZ do not constitute correctable “clerical errors” under 19 U.S.C. § 1520(c)(1). According to the government, a clerical error is a “mistake made by a clerk or other subordinate, upon whom devolves no duty to exercise judgment in writing or copying the figures or in exercising his intention.” (Def.’s Pretr. Br. at 12 (quoting *PPG Indus., Inc. v. United States*, 7 CIT 118, 124 (1984)).) The government asserts, however, that evidence at trial shows that as the FTSZ Coordinator, Tullock held a position that required him to assume significant responsibilities and exercise considerable judgment in performing those duties. For example, as FTSZ Coordinator, Tullock was involved in establishing the FTSZ and was charged with handling the paperwork relating to the parts to be “controlled” within the zone.

Moreover, the government asserts, the evidence at trial demonstrates Tullock was not well-trained or well-supervised. Regarding training, the government points to evidence at trial that the list of parts to be controlled identified in a memorandum entitled “Status of Louisville Assembly Plant as a Foreign Trade Zone,” dated January 17, 1985, from Tullock to William Kuchenbrod, Tullock’s parts control supervisor, indicates all seven parts identified in the memorandum could be used for either cars or trucks. However, the memorandum “does not indicate how these interchangeable parts were to be divided between Bronco II parts and Ranger parts before entering the zone.” (Def.’s Post-Tr. Br. at 22.) Nor was there any mention of NPF or PD or “how Tullock would cause the parts to be designated as either ‘PD’ or ‘NPF.’” (*Id.*) Kuchenbrod testified, however, that as far as he knew, engines and transmissions for Bronco IIs were not segregated from engines and transmissions for Rangers when they entered the plant. Thus, there would be no way of knowing which type of vehicle the part would ultimately end up in because, prior to production, no one kept track. Thus, the government argues, Kuchenbrod’s testimony does not support that Ford adequately trained Tullock.



Testimony from Moody, the government argues, further fails to demonstrate that Ford adequately trained Tullock. First, Moody acknowledged at trial that he was not aware that some of the parts to be controlled in the FTSZ were interchangeable and that had he known, he would have removed any common usage parts from the program.<sup>9</sup> Further, Moody testified that in setting up the FTSZ at Louisville, Tullock visited other FTSZ that were already operating. Tullock was expected to copy the inventory and record keeping systems of the other plants. The government notes, however, that none of these plants had to control common usage parts. Thus, the training Tullock received was not adequate for the unique features at the Louisville FTSZ. Additionally, the only written material provided to Tullock was Ford's FTSZ manual. The government points out, however, that the manual was used for all of Ford's FTSZs and was not specific to the Louisville plant. Indeed, the government asserts, the document is silent with respect to how to deal with PD merchandise. In sum, the government claims, Moody's testimony does not demonstrate that Tullock was adequately instructed and trained on how to be a FTSZ Coordinator at Louisville.

Moreover, the government contends, Tullock's own testimony at trial does not demonstrate he was instructed and trained adequately on how to be a FTSZ Coordinator. According to Tullock, he had to do the paperwork based on observations from other plants, but he was unable to do the paperwork adequately as the other plants were not operating zones with different vehicles coming down the same assembly line. Thus, there was no correlation between the zones at the plants where he received his training and the job he was actually supposed to do. Moreover, Tullock testified no one explained to him how to do the paperwork differently. Thus, the government asserts, he was not adequately trained.

Regarding supervision, the government argues, Tullock was essentially left on his own at Louisville to manage the FTSZ and prepare all applicable paperwork and was not supervised by anyone at the Louisville plant with knowledge of foreign trade zone management. Kuchenbrod, who was Tullock's only officially designated supervisor within the Ford organization, testified he "knew almost nothing about Tullock's FTZ responsibilities." (Def.'s Post-Tr. Br. at 20.) According to Kuchenbrod, Anderson and Moody, division people from Ford Headquarters, were the people to whom Tullock would turn with any problems or concerns. When Tullock told Kuchenbrod he was having trouble, Kuchenbrod would tell him to call the division people. The government points out, however, Kuchenbrod did not know whether Tullock heeded that advice, and when Kuchenbrod would ask whether Tullock received the information he needed, Tullock would sometimes

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<sup>9</sup> The government also cites to testimony by Lars Anderson indicating he, too, appeared to be unaware that at least some of the parts being controlled in the Louisville FTSZ were common to cars and trucks

say, “No.” Further, Anderson testified that once the zone was established, there was no requirement that the zone had to report formally to Anderson’s office. Anderson testified Kuchenbrod was Tullock’s supervisor. The government points out, however, that Tullock was the only person at the Louisville plant with any knowledge regarding FTSZs. The government argues such negligence by Ford is not remediable under § 1520(c).

Thus, the government contends, Ford has not sustained its burden of demonstrating either that Customs acted unlawfully in extending liquidation of the entries at issue or that the NPF designation of and the failure to pay duties on the entries are correctable errors under the statute.

### III. DISCUSSION

#### A. *Legality of the Extensions of Liquidation*

##### 1. *Standard of Review*

This Court reviews Customs’s decisions to extend the time to liquidate under an abuse of discretion standard. *See* 5 U.S.C. § 706(2)(A) (1994); *Ford II*, 157 F.3d at 855; *St. Paul*, 6 F.3d at 768; *International Cargo & Surety Ins. Co. v. United States*, 15 CIT 541, 542, 779 F. Supp. 174, 176 (1991); *Detroit Zoological Soc’y v. United States*, 10 CIT 133, 137-38, 630 F. Supp. 1350, 1356 (1986) (decisions to extend liquidation reviewed for arbitrariness and abuse of discretion). Such an abuse of discretion “may arise only when an extension is granted even following elimination of all possible grounds for such an extension.” *St. Paul*, 6 F.3d at 768. Thus, the Court cannot uphold a decision to extend the liquidation if “it can be shown that the importer . . . eliminated all reasonable bases for making that decision.” *Id.* “Extending a period of liquidation with actual knowledge that no basis exists for so doing,” for example, “would be an abuse of Customs’ discretion.” *Id.* Thus, there is “a narrow limitation on Customs’ discretion to extend the period of liquidation.” *Id.*

In determining whether Customs’s decisions to extend liquidation are sufficiently unreasonable to constitute an abuse of discretion, “the decision[s] of [Customs] . . . [are] presumed to be correct,” and the burden of proving otherwise is on the importer. 28 U.S.C. § 2639(a)(1); *St. Paul*, 6 F.3d at 768; *see generally Century Importers, Inc. v. United States*, 205 F.3d 1308, 1311 (Fed. Cir. 2000). This presumption is only a procedural device which allocates the burden of producing sufficient evidence. *See Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492-93 (Fed. Cir. 1997). *St. Paul* requires that the importer overcome the presumption of correctness by a preponderance of the evidence. *See St. Paul*, 6 F.3d at 769. The Federal Circuit has defined preponderance of the evidence as “the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it.” *Id.* (quoting *Hale v. Department of Transp., FAA*, 772 F.2d 882, 885 (Fed. Cir. 1985)). Further, the government is entitled to rely on a presumption of regularity, that is, “it may be presumed that the

import specialist . . . properly performed [his] duties.” *Id.*; see also 2 KENNETH S. BROUN, ET AL., MCCORMICK ON EVIDENCE § 343, at 438-39 (John W. Strong, ed., 5<sup>th</sup> ed. 1999).

## 2. *Legislative Scheme*

Imported merchandise not liquidated within one year of its entry into the United States “shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer . . . .” 19 U.S.C. § 1504(a).<sup>10</sup> The statute provides, however, Customs may extend the period in which to liquidate an entry under three specific circumstances, including if “information needed for the proper appraisalment or classification of the merchandise is not available to the appropriate customs officer.” 19 U.S.C. § 1504(b)(1).<sup>11</sup> Customs’s regulation additionally requires that any individual extension may not exceed one year. See 19 C.F.R. § 159.12(a)(1) (1985). Almost no circumstance justifies a delay in liquidation beyond four years. See 19 U.S.C. § 1504(d) (1982).

## 3. *Extension of Time to Liquidate*<sup>12</sup>

Customs invokes subsection (b)(1)C “information needed for the proper appraisalment or classification of the merchandise is not available to the appropriate customs officer” to justify its extensions. As Customs invokes subsection (b)(1) to justify its extensions, to prevail in this

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<sup>10</sup> Section 1504(a) provides, in pertinent part:

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise;

. . . .

shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer . . . .

19 U.S.C. § 1504(a) (1982).

<sup>11</sup> Section 1504(b) provides, in pertinent part:

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer . . . in such form and manner as the Secretary shall prescribe in regulations, if C

(1) information needed for the proper appraisalment or classification of the merchandise is not available to the appropriate customs officer;

(2) liquidation is suspended as required by statute or court order; or

(3) the importer . . . requests such extension and shows good cause therefor.

19 U.S.C. § 1504(b).

<sup>12</sup> The Court initially considers whether it was reasonable for Customs to extend liquidation in the first instance. The reasonableness of the length of the extensions will be considered later in this opinion.

case, plaintiff must prove, pursuant to *St. Paul*, 6 F.3d at 768, that it was unreasonable for Customs to extend liquidation on the premise that information needed for the proper appraisal or classification of the merchandise was not available to the appropriate customs officer.<sup>13</sup> Here, plaintiff has not made a sufficient showing to meet its burden.

a. *Initial Extension*

The government appears to put forward principally two reasons why Customs's decisions to extend liquidation were reasonable.<sup>14</sup> First, the government argues the appropriate Customs official postponed liquidating the eleven entries while waiting for further information which was necessary to ensure the correct classification and appraisal of the imported merchandise. Second, although Customs extended the liquidation because it was Customs's policy to extend liquidation during the pendency of a § 1592 investigation, it was reasonably expected that the fraud investigation could produce information affecting the classification or appraisal of the merchandise thus justifying the extensions.

The government points to the following evidence to support its argument that Customs's decisions to extend liquidation were reasonable. Defendant supports its first contention by pointing to documentary evidence that McNally authenticated at trial indicating he had certain concerns that needed to be addressed through discussions with Ford and/or through an investigation. The documents include handwritten notes from meetings in January 1986 and February 1987 and the Significant Importation Report. (See Def.'s Post-Tr. Br. at 3-4 (citing Plaintiff's Exhibits (Pl.'s Exs.) 1, 3, 8, and 58 discussed in the Trial Transcript (Trial Tr.) at 90-96, 102-04, 111-12, 126, and 185-86<sup>15</sup>.) These

<sup>13</sup> Ford appears to interpret the wording in section 1504(b)(1) to mean in order for an extension to be proper, the appropriate Customs officer, *e.g.*, the import specialist who granted the extensions, personally has to need information or, in the case of an ongoing fraud investigation, personally has to have a "reasonable expectation" that the investigation will produce information about classification or appraisal. The Court finds such an interpretation unnecessarily narrow. The statute permits an extension if "information needed for the proper appraisal or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1). While the Court agrees the appropriate Customs officer in this case is the import specialist, there is nothing in the statute which limits the need for the information to that specific officer. Rather, the statute suggests the information needed is that which is needed by Customs generally to allow the Customs officer to classify and/or appraise properly the merchandise at issue. In other words, while the import specialist may functionally perform the act of extending the liquidation, there may effectively be other Customs officials involved in the decision whether to extend liquidation who may believe certain circumstances require additional information in order for the appropriate Customs officer to classify or appraise properly the merchandise at issue and may be in an even better position to make that decision. The wording in the Federal Circuit's opinion remanding this case for trial appears to support such a reading. In discussing the standard for determining under what circumstances an ongoing fraud investigation might be a reasonable basis upon which Customs may extend liquidation, the Federal Circuit stated, "even if Customs expected the investigation to turn up information relevant to appraisal and classification, that expectation alone cannot justify summary judgment." *Ford II*, 157 F.3d at 857 (emphasis added). Thus, it appears, if Customs generally, including supervisors of the "appropriate customs officer" and/or the "appropriate customs officer" himself, believed information was needed or reasonably expected the investigation to turn up information relevant to appraisal or classification of the merchandise, such a need or expectation would fall within the confines of section 1504(b)(1).

<sup>14</sup> The Court recognizes Ford, not the government, bears the initial burden of coming forward with the evidence. For convenience, nevertheless, the Court discusses the evidence put forth by the government at this point.

<sup>15</sup> The government also cites in its brief to "P-11" indicating reference to Plaintiff's Exhibit 11 (Pl.'s Ex.). (See Def.'s Post-Tr. Br. at 3.) A careful reading of the relevant pages in the trial transcript indicates, however, that rather than referring to Pl.'s Ex. 11 (which appears to be a chart indicating Customs extended liquidation on the eleven entries at issue), the transcript is intended to refer to Pl.'s Ex. 1-1. See Trial Tr. at 90-91.

documents indicate concerns regarding, among others things, Ford's 807 TSUS claims on some of the entries.<sup>16</sup> The government acknowledges that although other areas of concern may also have existed, "McNally could not remember any specific concerns other than those noted in his documents" at trial. (*Id.* at 4.)<sup>17</sup> Moreover, the government argues, the fact that the Significant Importation Report only indicates the matter was referred for investigation because of the quantum of money involved and not because of any need for additional information, does not prove the matter was not referred for additional information. Defendant points to testimony by various Customs officials indicating the Significant Importation Report is not intended to be comprehensive. (*See* Def.'s Reply to Pl.'s Post-Tr. Br. at 2-3 (citing Trial Tr. at 725-26 and 752-53).) Defendant also argues testimony at trial revealed that "a significant potential loss of revenue arising because of apparent substantive errors in the entries would . . . be a signal that something is amiss with the information provided for purposes of classifying and/or appraising the entered merchandise." (*Id.* at 3 (citing Trial Tr. at 729-30).)

Additionally, defendant points to the testimony of Hilton Duckworth to support its contention that further information was needed to classify and appraise the merchandise. Duckworth testified that if any entries remained unliquidated, all import specialists under his supervision had to "justify [to him] why entries remain unliquidated." Trial Tr. at 782. Duckworth further testified that a "rather significant percentage of entries B were immediately liquidated because there were no question [sic] concerning how the merchandise should be appraised and classified" and those that were not liquidated right away were reviewed by import specialists. Trial Tr. at 790. According to Duckworth, the "review was to determine whether or not the entries could be liquidated immediately or whether [the import specialist] needed additional information, in which case the entries would be placed in holding files . . ." until the import specialist "took action to obtain information." Trial Tr. at 791. Finally, the government argues Duckworth's testimony indicates it would be "unusual" for McNally to have had all the information needed to liquidate the entries properly

<sup>16</sup> For a complete list of the documents to which the government cites, *see* discussion *supra* Part II.B.

<sup>17</sup> The government also attempts to justify McNally's statement in his deposition in 1994 that although he could not remember any specific information he was waiting for after he prepared the Memorandum of Information Received with respect to classification or value of the merchandise, he must have been waiting for additional information because he referred the matter for investigation, and the entries were not liquidated. The government states that although at first blush this reasoning may appear faulty, it is really quite logical. The government argues,

As an import specialist for 30 years, it would be inconceivable that McNally did not know the existing statutory bases for extending liquidations between 1985 and 1989. Given this fact, it is apparent that stating he must have needed more information by virtue of the fact that the liquidations were extended was McNally's "shorthand" way of indicating that, despite being unable to recall what specific information he needed or expected, inasmuch as he knew that he could not lawfully extend the liquidation of an entry without needing additional information to properly classify and/or appraise Ford's merchandise, the fact of the extension is evidence that, at the relevant time, he needed such additional information.

(Def.'s Post-Tr. Br. at 4-5.) The Federal Circuit identified this reasoning as circular: "Customs delayed because it needed more information yet argues it must have needed more information because it delayed." *Ford II*, 157 F.3d at 856. This Court agrees, and, therefore, does not consider McNally's deposition testimony on this point as evidence further information was needed for the proper classification or appraisal of the merchandise at issue.

but not to have taken that information into account until his final calculation. Duckworth testified, “with the significance of these importations, the amount of duty involved, the import specialist would have reviewed this situation from every possible angle, and other people would have looked at it.” Trial Tr. at 862.

To support its second contention, the government points to McNally’s testimony that whether a § 1592 investigation and/or an importer’s culpability would affect the classification or appraisement of merchandise would “depend on the particular circumstances,” (Def.’s Post-Tr. Br. at 5 (citing Trial Tr. at 168)), and that McNally’s estimate of the duty increase initially identified by him in the summer of 1986 “could have changed” “based on additional information [McNally] might have received prior to liquidation.” (*Id.* (citing Trial Tr. at 237).) The government also points to Duckworth’s affirmative response to questioning at trial that the circumstances under which fraud would be investigated could affect the information used by an import specialist to classify or appraise properly the merchandise. (*See id.* at 8 (citing Trial Tr. at 807-08).) The government additionally points to testimony by Fritz and Cortesi to support further this concept. (*See id.* at 13 (citing Trial Tr. at 361 and 370) and 17 (citing Trial Tr. at 727).) Testimony provided at trial, the government asserts, further indicates it is impossible to know, at the outset of an investigation, what information will be uncovered. (*See* Def.’s Reply to Pl.’s Post-Tr. Br. at 6 (citing Trial Tr. at 807-08, 819-20, and 874-76).) Moreover, the government points to Duckworth’s testimony that he recalled in *this* case the entries were extended “to verify information needed to correctly classify the merchandise in light of the possible fraud and withholding of duties.” (Def.’s Post-Tr. Br. at 9 (citing Trial Tr. at 818).) Additionally, the government argues, although Duckworth and Littlefield may not have made the decision to extend liquidation, there is no dispute that they knew liquidations could be extended only if Customs needed more information to classify and appraise properly the merchandise, and they nevertheless approved the extensions.<sup>18</sup> As the witnesses were government officials, the government argues, it should be presumed their actions were proper.

To prove Customs’s extensions of liquidation were unreasonable, plaintiff appears to argue essentially two points. Plaintiff suggests no information was needed for the proper appraisement or classification of the merchandise by the appropriate Customs officer because: 1)

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<sup>18</sup> The government points, in particular, to evidence of Duckworth’s signature on the Memorandum of Information Received indicating Duckworth concurred in the decision to refer the entries at issue for investigation. The Court notes defendant refers to Duckworth’s signature on “Exhibit P-8, the MOIR,” in its post-trial brief. (Def.’s Post-Tr. Br. at 8.) The Memorandum of Information Received, however, is identified in evidence as Pl.’s Ex. 9. As Duckworth’s signature only appears on Pl.’s Ex. 9, the Memorandum of Information Received, the Court treats defendant’s citation as a citation to Pl.’s Ex. 9, rather than to Pl.’s Ex. 8.



McNally, the Customs officer in Cincinnati responsible for classifying and appraising the merchandise, had all the information required to complete the liquidation by mid-1986, and evidence from trial fails to support the proposition that he needed additional information for the proper appraisal or classification of the merchandise; and 2) McNally only extended the liquidation because it was Customs's policy to withhold automatic liquidation during the pendency of a § 1592 investigation, and McNally had no reasonable expectation that the investigation would produce information needed for classification or appraisal.

To support its contentions, Ford points to the Significant Importation Report dated July 29, 1986, which indicates McNally had in his possession as of the date of the report the eleven entries, correspondence, and documents from Ford and Ford's operating manual. (See Pl.'s Post-Tr. Br. at 2 (citing Pl.'s Ex. 8-3).) Further, Ford points to McNally's testimony at trial that he could not recall whether he subsequently requested additional documents or information from Ford or Customs after mid-1986.<sup>19</sup> (See *id.* at 2-3 (citing Trial Tr. at 137).) Ford also points to the language in the Significant Importation Report stating that McNally prepared a Memorandum of Information Received to the Office of Enforcement solely "[b]ased on the significant amount of duty involved," (*id.* (quoting Pl.'s Ex. 8-3)), and to McNally's deposition testimony in 1994 that he could not recall any other reasons for the referral. Ford also cites McNally's testimony that he did not liquidate because it was Customs's policy not to liquidate entries under a § 1592 investigation and that he could not recall any other reasons why he did not liquidate the entries. Given McNally's testimony, Ford argues, "it cannot be presumed that McNally extended liquidation because he needed additional classification or value information." (*Id.* at 4.) Additionally, Ford cites the testimony of two Customs's agents—Special Agents Fritz and Kyle. According to Ford, Fritz testified "McNally never asked [Fritz] to obtain any information or documentation." (*Id.* (citing Trial Tr. at 307).) Kyle testified McNally did not "either notify [Kyle] through writing or verbally in person" that McNally needed information to allow him to liquidate the entries. (*Id.* at 5 (quoting Trial Tr. at 445).) Further, Ford points to evidence that although Duckworth, McNally's supervisor, could recall other reasons for extending liquidation,<sup>20</sup> he was not involved in making the decision to extend liquidation and, in all probability, did not justify the extensions until after the fact. (See *id.* (citing Trial Tr. at 814).) More-

<sup>19</sup> Ford also points to McNally's statement in his 1994 deposition, read into evidence in part, see Trial Tr. at 180-81, that he expected additional classification and value information after his July 1986 report. When asked what that information must be, McNally stated he could not remember but added he knew he was waiting for information because "[he] did not liquidate the entries." Trial Tr. at 181. As stated previously, see *supra* note 17, the Federal Circuit found, and this Court agrees, this reasoning is circular, and, therefore, this court does not consider McNally's deposition testimony on this point as evidence further information was needed for the proper classification or appraisal of the merchandise at issue.

<sup>20</sup> Hilton Duckworth, the Cincinnati Port Director and McNally's supervisor, testified that, to his recollection, liquidation was extended, "because of possible fraud and withholding of duties, and also to verify information . . . in order to be able to make a correct classification of the imported merchandise." Trial Tr. at 818.

over, Ford points to testimony by Duckworth that he could not recall any instances in which McNally told him he needed additional information from anyone in order to classify or appraise the merchandise. (See *id.* at 6 (citing Trial Tr. at 822).) Ford asserts, “McNally’s silence to his supervisor belies any presumption that he needed more information.” (*Id.*)

To support its second contention, Ford additionally argues in order to justify the liquidation extension under the investigation, the Federal Circuit required that the record “show that the fraud investigation was *reasonably expected* to produce information about “appraisement” and “classification.”” (*Id.* at 9 (quoting *Ford II*, 157 F.3d at 856) (emphasis in original).) Ford interprets this standard as requiring that the relevant Customs officer, in this case McNally, “must have had a subjective expectation that the fraud investigation would produce information needed for classification or appraisement that was otherwise unavailable, and that expectation must have been objectively reasonable.” (*Id.* (citing *Montgomery Ward & Co. v. NLRB*, 668 F.2d 291, 298 (7<sup>th</sup> Cir. 1981) (identifying elements of “reasonable expectation” in employment law context)).) Ford argues because the evidence shows McNally did not tell his supervisor he needed information nor did he seek or request information of any kind from the agents, he had no expectation that the investigation would produce needed classification or appraisement information. Moreover, Ford argues, the evidence is clear that in this case, even if there is a theoretical possibility that the fraud investigation could produce information regarding classification or appraisement, the evidence shows McNally had no such subjective expectation.

Further, to support its second contention, Ford argues evidence in the record indicates Customs could not reasonably expect the investigation would yield needed classification or appraisement information from the mere pendency of an 807 audit of FERCO. First, Ford points to evidence that Ford only claimed 807 treatment on four of the eleven entries. (See *id.* at 7 (citing Ct. Ex. 1, Sched. C, & 50).) Second, Ford points to evidence it claims shows the FERCO audit was only concerned with possible commingling of U.S. and foreign parts assembled into radios entered by FERCO at Landsdale, Pennsylvania, see Pl.’s Ex. 50, and not with 807 claims on the subject entries involving engines and transmissions in Louisville.

Upon examination of the documentary and testimonial evidence admitted at trial, this Court finds Ford has not put forth sufficient evidence to satisfy its burden of showing it was unreasonable for Customs to extend liquidation on the premise that information needed for the proper appraisement or classification of the merchandise was not available to the appropriate Customs officer. Ford has not met its burden of eliminating all reasonable bases for extending the liquidation and thus has not shown Customs abused its discretion in deciding to extend liquidation in the first instance. First, the evidence to which Ford cites to support its contention Customs had all information needed

to classify or appraise the merchandise by the initial extension fails to demonstrate the same. Although the Significant Importation Report indicates that as of July 1986, McNally had certain information, such evidence is not dispositive that McNally did not need additional information. Indeed, evidence adduced at trial indicates otherwise. For example, evidence indicates that, at least initially, McNally had some concerns there might be an 807 issue regarding the imported engines and transmissions in the Louisville FTSZ. *See* Trial Tr. at 893. Documentary evidence further indicates that at least as of February 6, 1987, Tullock<sup>21</sup> agreed to furnish any additional information needed concerning the 807 issue to Customs. This apparent need for 807 information exists despite the fact that, in hindsight, as Ford points out, it appears the 807 issue may not have concerned engines and transmissions at the Louisville FTSZ but rather electronic parts entered through Philadelphia or Landsdale. *See* Trial Tr. at 889-93. The testimony combined with the documentary evidence indicating Tullock would forward needed information concerning the 807 issue indicates to this Court that some information concerning the 807 issue was believed to be outstanding at least as of February 1987. Additionally, Duckworth testified the entries were extended in part “to verify information . . . in order to be able to make a correct classification of the imported merchandise.” Trial Tr. at 818. That Customs extended liquidation in part to verify information suggests additional information might have been needed to assure the accuracy of the information already in Customs’s possession. Moreover, that McNally could not recall any instances in which he requested additional documents or information from Ford or Customs is inconclusive. McNally’s failure to recall that he requested information is neither evidence he never requested information nor, more importantly, evidence he did not need additional information. Based on the evidence presented by Ford, it simply has not been able to show it was unreasonable for Customs to extend liquidation on the premise that information needed for the proper classification or appraisal of the merchandise was unavailable to the appropriate Customs officer.

Second, regarding Ford’s citation to the Significant Importation Report, testimony at trial indicates the Significant Importation Report is not intended to be a comprehensive document. *See* Trial Tr. at 725-26 and 752-53. Thus, the fact that the Significant Importation Report only indicates the reason for the referral was because of the significant amount of duty involved does not prove McNally did not also refer the case because information was needed to classify or appraise the merchandise.

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<sup>21</sup> It was not established conclusively at trial that Tullock was the person who agreed to forward the 807 information; however, such a conclusion, the Court believes, would be a fair reading of the notes referring to “807.00 info” on Pl.’s Ex. 58-3. Thus, for the purposes of stating that information concerning the 807 issue likely was needed as of February 6, 1987, the Court will refer to the person who agreed to forward the information as “Tullock.”

Additionally, the evidence put forth by Ford concerning the testimonies of Fritz, Kyle, and Duckworth fails to show it was unreasonable for Customs to extend liquidation on the premise that information needed for the proper appraisalment or classification of the merchandise was not available to the appropriate Customs officer. First, the credibility of both Fritz's and Kyle's statements to which Ford cites is called into question in light of the surrounding testimony of each witness.<sup>22</sup> Ford points to Fritz's statement that McNally did not "ever ask [Fritz] to obtain any information for him." Trial Tr. at 307. In the previous question, however, Fritz testified that he could not recall McNally "ever asking of [him] that [he] obtain any particular documentation for [McNally]." Trial Tr. at 307. The Court is skeptical that Fritz could remember that McNally never asked Fritz to obtain information but could not recall whether McNally ever asked him to obtain any particular documentation. Further, Ford points to Kyle's statement that if McNally needed information from Kyle to allow him to liquidate the entries, "[McNally] could either notify [Fritz] through writing or verbally in person . . . and he did not do any of those." Trial Tr. at 445. Kyle testified, however, shortly before making this statement that it was his "recollection" that "McNally never requested [him] to provide any information regarding classification and appraisalment." Trial Tr. at 444. The Court wonders how Kyle did not know with certainty but only "recalled" that McNally never requested him to provide information but yet knew with certainty that McNally did not notify him that he needed information. Moreover, Duckworth in his testimony merely states that he did not "recall" any instance in which

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<sup>22</sup> Fritz testified, in relevant part:

Q. Do you recall [McNally] ever asking of you that you obtain any particular documentation for him, other than what was forthcoming as a result of your service of the summons in February?

A. No.

Q. Did [McNally] ever ask you to obtain any information for him?

A. No.

Trial Tr. at 307.

Kyle testified, in relevant part:

Q. I believe you testified that Mr. McNally never requested you to provide any information regarding classification and appraisalment; is that correct?

A. That's my recollection.

...

Q. Did you have any way of knowing that Mr. McNally might have needed information to allow him to liquidate the entries if he didn't tell you that he needed that information?

A. He could either notify me through writing or verbally in person or writing and he did not do any of those.

Trial Tr. at 444-45.

McNally requested information from the agents or that he did not “recall” that McNally ever indicated to Duckworth that he expected to receive such information.<sup>23</sup> Duckworth’s failure to recall is neither evidence McNally never requested information from the agents or that McNally did not expect to receive such information nor, more importantly, evidence McNally did not need additional information.

Moreover, even if the testimony proffered were to show what plaintiff purports it to show, the mere absence of evidence to support the proposition that information needed to classify and appraise the merchandise properly was unavailable to McNally does not prove that such information was not needed. To argue as such is analogous to committing the fallacy of *argumentum ad ignorantiam*. This fallacy occurs when one claims that the absence of evidence in support of a proposition establishes that the proposition is false. In most cases, such an assumption is false. See generally IRVINE M. COPI, INTRODUCTION TO LOGIC 57-58 (2<sup>nd</sup> ed. 1961). Thus, the alleged lack of evidence to support the proposition that information needed for the proper appraisal or classification of the merchandise at issue was not available to the appropriate Customs officer would not prove the proposition is false or that it was unreasonable for Customs to extend liquidation on that premise.

Moreover, this Court finds Customs did not abuse its discretion in extending liquidation as plaintiff has not shown Customs did not reasonably expect the investigation to produce information about appraisal or classification. A need for internal information, like that sought by Customs in the fraud investigation, may satisfy the requirements of section 1504(b)(1). See *Ford II*, 157 F.3d at 856; *A Classic Time v. United States*, 20 CIT 1198, 1203, 942 F. Supp. 589, 594 (1996) (citing *Detroit Zoo.*, 10 CIT at 138, 630 F. Supp. at 1356-57 (stating the “term ‘information’ as it is used in the statute, . . . should be construed to include whatever is reasonably necessary for proper appraisal or classification of the merchandise involved. When a request for internal advice of a classification decision is granted, the ‘information’ required to make the appropriate classification includes that advice.”)); see also *International Cargo & Surety Ins. Co.*, 15 CIT at 546, 779 F. Supp. at 178-79. According to the Federal Circuit in its opinion remanding this case for trial, in order for the fraud investigation to justify the liquidation extensions, the record must “show that the fraud investigation was reasonably expected to produce information about ‘appraisal’ and ‘classification.’” *Ford II*, 157 F.3d at 856. Plaintiff predominately focuses its argument on whether McNally himself had

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<sup>23</sup> Duckworth testified, in relevant part:

Q. Do you recall any instance where Mr. McNally requested information from the agents that he needed in order to appraise or classify the merchandise?

A. At this point, no, I don't recall that.

Q. Do you recall him ever indicating to you that he expected to receive such information?

A. No.

Trial Tr. at 822.

a reasonable expectation that the investigation would or could produce information about appraisement or classification and argues no such expectation existed primarily because the evidence shows McNally “did not tell his supervisor that he needed such information, nor did he seek or request information of any kind from the agents.”<sup>24</sup> (Pl.’s Post-Tr. Br. at 9.)

Ford puts forth substantially the same evidence here to support its claim that McNally did not have a reasonable expectation the investigation would produce information about the classification or appraisement of the merchandise at issue as it did to support its prior assertion that it was unreasonable for Customs to extend liquidation on the premise information needed for the proper appraisement or classification of the merchandise at issue was not available to the appropriate Customs officer. As discussed at length above, however, the Court is not persuaded by Ford’s evidence. In other words, Ford has failed to meet its burden of proof. The Court notes the mere absence of evidence to support the proposition that McNally reasonably expected the investigation to produce information about appraisement or classification does not prove McNally did not have such an expectation.

Moreover, as much as Ford appears to have tactically decided to focus all its attentions on McNally, it has failed in its burden to prove whether other responsible officers of Customs *as a whole* may not have had a reasonable expectation that the investigation would produce information about classification and appraisement of the merchandise at issue.<sup>25</sup> Indeed, evidence on the record suggests otherwise.<sup>26</sup>

Testimony also indicates it is impossible for Customs to know with precision at the onset of the investigation what information ultimately could be revealed. *See* Trial Tr. at 877. Further, testimony indicates, and this Court agrees, even if Customs is forced to liquidate the entries pursuant to a statutory cap of four years without the benefit of the results of the investigation, the reasonableness of awaiting the results of the investigation is not undermined as the reasonableness of the extensions must be viewed from the time the extensions are issued, and Customs may not know until the end of the investigation whether the information would affect the classification or appraisement of the merchandise. *See, e.g.*, Trial Tr. at 807-08. Moreover, the evidence does not indicate Customs had any reason to believe that in this case the investigation would not lead to information which could

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<sup>24</sup> Ford bases its conclusion on the legal standard and reasoning provided in *Montgomery Ward & Co. v. NLRB*, 668 F.2d 291 (7<sup>th</sup> Cir. 1981). *Montgomery Ward* discusses a reasonable expectation standard in an employment context. *See id.* at 298. This Court finds this standard inapposite to a determination by Customs.

<sup>25</sup> *See* discussion *supra* note 13.

<sup>26</sup> Testimony at trial from McNally, Duckworth, Fritz, and Cortesi overwhelmingly indicates that during the ongoing fraud investigation, a reasonable expectation of Customs was that the investigation could turn up information relating to classification or appraisement of merchandise being investigated. *See* Trial Tr. at 237, 807-08, 361, 370, and 727.



assist the appropriate Customs's official in properly classifying or appraising the merchandise. Accordingly, this Court finds Customs did not abuse its discretion in extending the time for liquidation of the entries while its investigation pursuant to 19 U.S.C. § 1592 was ongoing.<sup>27</sup>

This Court makes this finding in light of the fact that the decisions of Customs are presumed to be correct and burden of proving otherwise is on Ford. *See* 28 U.S.C. § 2639(a)(1); *St. Paul*, 6 F.3d at 768; *see generally Century Importers*, 205 F.3d at 1311. *St. Paul* requires that the importer overcome this presumption by a preponderance of evidence. *See St. Paul*, 6 F.3d at 769. Further, the government is entitled to rely on a presumption of regularity, that is, "it may be presumed that the import specialist . . . properly performed [his] duties." *Id.* This Court finds Ford has not met this burden and Ford has not rebutted either of these presumptions.

It may well be argued that to meet its burden the importer has a difficult task indeed. Nevertheless, Congress placed this burden upon the importer. In situations where, as here, the decision by Customs to extend liquidation was made on the basis of section 1504(b)(1), such a burden requires the importer prove it was unreasonable for Customs to extend liquidation on the premise that information needed for the proper classification or appraisal of the merchandise at issue is not available to the appropriate Customs officer or, in the case of a fraud investigation, as the Federal Circuit has indicated, where the fraud investigation was reasonably expected to produce information about appraisal or classification. This Court will not lessen that burden absent a clear directive from Congress or our appellate Court.

#### b. *Length of the Extensions*

Although the Court finds plaintiff failed to show it was unreasonable for Customs to extend liquidation on the premise that information needed for the proper appraisal or classification of the merchandise at issue was unavailable to the appropriate Customs officer or that Customs did not reasonably expect the fraud investigation to produce such information, Customs's extensions—especially in October of 1987 and October 1988—cannot be sustained if plaintiff can show the length of the extensions was unreasonable. *See generally Detroit Zoo*, 10 CIT at 138, 630 F. Supp. at 1357 (stating "an extension [may] be

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<sup>27</sup> Such a finding is not in conflict with the purposes of section 1504. Prior to the enactment in 1978 of 19 U.S.C. § 1504, Customs could delay liquidation as long as it pleased, with or without giving notice. *See, e.g., Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1562 (Fed. Cir. 1984); *see* S. REP. NO. 95-778, 95<sup>th</sup> Cong., 2d Sess. 1, 32 (1978), reprinted in 1978 U.S.C.C.A.N. 2211, 2243. Section 1504 was added simply to "increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction." S. REP. NO. 95-778, 95<sup>th</sup> Cong.; U.S.C.C.A.N. at 2243. It was also enacted to accommodate requests from trade partners that the government establish a time limit within which liquidation must occur. *See Ambassador*, 748 F.2d at 1562-63. However, the legislative history does not indicate that the statute was intended to tie the hands of Customs to such an extent that it would be difficult for Customs to fulfill its responsibility of properly classifying or appraising imported merchandise—a situation which may well develop where Customs is forced to liquidate even despite the presence of an ongoing fraud investigation concerning the very merchandise with which Customs is charged to classify or appraise properly.

granted only for a reasonable period of time relative to the situation”). The Federal Circuit in remanding this case for trial specifically stated that the length of time it took Customs to process information and liquidate the entries and the length of the fraud investigation are subject to scrutiny for reasonableness. *See Ford II*, 157 F.3d at 856 (stating, “[a] full airing of the facts may disclose that [Customs’s delay] was unreasonable and therefore an abuse of Customs’ discretion,” and “the length of the fraud investigation is subject to scrutiny for reasonableness”). Thus, this Court analyzes Ford’s proffered evidence concerning the reasonableness of Customs’s delay in seeking and processing information and the reasonableness of the length of the investigation relative to the situation.<sup>28</sup>

Ford argues even if the Court were to find Customs needed additional information to appraise or classify properly the merchandise at issue or reasonably expected the investigation to produce such information, the entries must be deemed liquidated “as entered” by operation of law due to unreasonable delays on the part of Customs. Ford attempts to show the unreasonableness of Customs’s delays by pointing to evidence of alleged inactivity in the investigation by Fritz, the first Special Agent assigned to the investigation, and statements made and documents created by Kyle, the second Special Agent assigned to the investigation, indicating he was waiting for information from McNally and that McNally failed to produce the desired information.

Regarding Fritz, although Ford acknowledges he had “other priorities,” Ford concludes “it is reasonable to believe that had he devoted even minimal time to the case in the 7 2 months between early March 1987 and the second extension in October 1987, the investigation could have been concluded well before the second extension.” (Pl.’s Post-Tr. Br. at 18.) Ford appears to draw this conclusion based on the fact that Kyle recalled “most of the case had already been completed” at the point the investigation was transferred to him, *see* Trial Tr. at 381-82; thus, all that remained to be finished was for Fritz to interview Ford and Customs personnel to determine further culpability. *See* Trial Tr. at 329.

Regarding Kyle, Ford argues that A[t]he record establishes that the only reason Agent Kyle could not expeditiously close out the investigation upon being assigned the case in late 1987 was McNally’s delay.” (Pl.’s Post-Tr. Br. at 18.) Ford singles out Kyle’s testimony indicating all he needed or wanted at some point in 1988 was for McNally to

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<sup>28</sup> Ford, in its papers before the Court, principally puts forth evidence regarding the reasonableness of the length of the investigation and appears to focus on the reasonableness of the length of time it took Customs to process information and liquidate the entries within that context. The Court’s analysis likewise focuses on the reasonableness of the length of the investigation and, within that context, to the extent relevant, on the reasonableness of the time it took Customs to process the information and liquidate the entries.

determine the appropriate rate of duty and provide Kyle with that information. *See* Trial Tr. at 385, 391, and 406. Ford cites, in particular, to testimony by Kyle that McNally admitted he did not work on the Ford matter for a long stretch in 1988, some seven or eight months, because he was busy with other work. (Pl.'s Post-Tr. Br. at 19 (citing Trial Tr. at 391).) Ford also points to notes from a meeting in February 1989 indicating McNally was to rectify certain discrepancies in figures on various documents in the entry packet. *See* Pl.'s Ex. 29-2. But, Ford argues, "these were tasks that McNally had known about for several years." (Pl.'s Post-Tr. Br. at 19.) Moreover, Ford contends, McNally's delay is not justified regarding any 807 issues for similar reasons. For example, Ford points to notes taken at a meeting in February 1987 between Ford and Fritz which suggest some 807 information was on file as of that date, *see* Pl.'s Ex. 58-5, and that Ford agreed to supply any additional information if needed. *See* Pl.'s Ex. 58-3 and 58-5. Ford contends, however, McNally did not send Ford a request for additional 807 information during the two year period from February 1987 to February 1989. That McNally concluded, based on the same information he had in February 1987, there was no 807 problem, Ford contends, proves it was unreasonable to extend liquidation on this basis because no further 807 information was needed. (*See* Pl.'s Post-Tr. Br. at 20 (citing Pl.'s Ex. 34).) Ford also points to evidence that Kyle made repeated requests to McNally for the information and that McNally failed to comply. (*See id.* at 21-22 (citing Trial Tr. at 400; Pl.'s Ex. 17).) Although Ford states Kyle admitted he had a heavy workload, Ford points to Kyle's testimony that he was not impeded by other investigations on this case. *See* Trial Tr. at 444. Thus, Ford contends, when considered in light of McNally's unexplained delays, the October 1988 extension, in particular, was unjustified and an abuse of Customs's discretion.

Defendant puts forth the following evidence in support of its contention that the length of the fraud investigation was reasonable. First, regarding Fritz, the government points to evidence that once Fritz was assigned the case in November 1986, he reviewed the Memorandum of Information Received and discussed the investigation and the reasons for the referral with McNally sometime prior to December 2, 1986. (*See* Def.'s Post-Tr. Br. at 12 (citing Trial Tr. at 309-10).) The evidence indicates Fritz engaged in activities concerning Ford through February 17, 1987, when Ford provided documents to Customs pursuant to a summons served on Ford. *See* Trial Tr. at 314 and 323-24. Fritz further admitted he reviewed the summoned documents for some time after their receipt. *See* Trial Tr. at 325. The government points to additional evidence indicating Fritz continued activity on the investigation through March 4, 1987, when Fritz interviewed Port Director Trussel but admits Fritz took no further action. *See* Pl.'s Ex. at 27-5. The government points to Fritz's testimony that although he "endeavored to be efficient and to complete his investigations as quickly as possible," (Def.'s Post-Tr. Br. at 14 (citing Trial Tr. at 353)), he "had

other priorities during that time” (*id.* (citing Trial Tr. at 328)), “including other investigations” (*id.* (citing Trial Tr. at 352)) and responsibilities (*see id.* at n.16 (citing Trial Tr. at 356)).<sup>29</sup> Further, there were no factors which would have required the investigation to be expedited. (*See id.* at 15 (citing Trial Tr. at 353).)

Regarding Kyle, the government points to testimony from Kyle that once he received and read the case, he discussed it with Fritz, a process which took several months. (*See id.* (citing Trial Tr. at 384).) Kyle testified that after reviewing the file, he determined he needed more information to complete the investigation, *see* Trial Tr. at 409, and he needed to interview additional Customs personnel. *See* Trial Tr. at 405 and 410. The government also points to evidence that some time in 1988 Kyle began feeling he was having trouble completing the investigation because he was waiting for information from McNally and that he would “from time to time” request that information. (Def.’s Post-Tr. Br. at 16 (quoting Trial Tr. at 388-90 and 441).) The government points out, however, that no notes of such conversations exist until after February 21, 1989. (*See id.* (citing Trial Tr. at 443).) Moreover, the government points to evidence that at the time Kyle was assigned to the case, he was busy setting up the Bowling Green office. The government cites evidence that Kyle was in charge of hiring and training staff, obtaining furniture and equipment, and handling all administrative responsibilities of the office. (*See id.* at 15 (citing Trial Tr. 430-32).) Additionally, the government cites evidence that Ford was only one of 25-50 cases assigned to Kyle from 1987-90. *See* Trial Tr. at 432. Robert Cortesi, the Resident Agent In Charge at U.S. Customs in Cincinnati, Ohio, the manager of the Cincinnati Office of Investigations and the Bowling Green sub-office, and the supervisor of all special agents, including Fritz and Kyle, testified that the gaps between the activities on the case were “reasonable” given the amount of information that had to be reviewed, the activity in the Bowling Green office at that time, and the other responsibilities assigned to the agent. *See* Trial Tr. at 740-44. Given all the evidence on the record, the government contends, Ford has not demonstrated the amount of time consumed was unreasonable or that the investigation could have or should have ended sooner.<sup>30</sup>

Upon examination of the evidence admitted at trial and after full consideration of the parties’ contentions, this Court finds Ford has not

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<sup>29</sup> These other responsibilities included “[f]or example, during the Fall of 1986, Fritz worked full-time for about thirty days with the Cincinnati Airport Narcotic Intervention Unit and in the Summer of 1987, he worked for about thirty days as the sole staff at the Bowling Green office. Fritz was also out on sick leave at the time the matter was transferred to Bowling Green.” (Def.’s Post-Tr. Br. at 14 n.16 (citing Trial Tr. at 356).)

<sup>30</sup> The Federal Circuit in remanding this case for trial raises the issue of the reasonableness of the length of the fraud investigation based on, for example, the need for 807 information. *See Ford II*, 157 F.3d at 867. The Court notes, however, that the government, in its papers submitted to this Court, does not look to the 807 issue to justify the length of the fraud investigation. Rather, the government focuses on the special agents’ need for additional information to complete the investigation, including the need to interview witnesses, even subsequent to the time in which the three extensions were granted. As defendant does not look to the 807 issue as a reason to justify the length of the fraud investigation, the Court will not address the reasonableness of the length of the investigation from the perspective that more information regarding the 807 issue was outstanding. This is not meant, however, to affect the Court’s finding in Part III.A.3.a that, at least as of February 1987, it appears Customs may have believed it needed information regarding TSUS 807 to classify or appraise properly the merchandise at issue.

demonstrated that the amount of time consumed was unreasonable or that the investigation could have or should have concluded sooner. First, with respect to the evidence proffered by Ford concerning the delays in the investigation under Fritz, the Court finds Ford has not shown the period of time Fritz took to work on the investigation was unreasonable. The record shows there was activity on the case from the time the case was assigned to Fritz in August 1986 at least through March 4, 1987, when Fritz interviewed Art Trussell, the former Louisville Port Director. Although it does not appear Fritz conducted additional activities on the case between March-November 1987, such an observation does not show the inactivity on the case was necessarily unreasonable. Rather, evidence suggests Fritz had other commitments and time constraints which limited his ability to work on the case. In addition to being assigned to other investigations, *see* Trial Tr. at 352, Fritz worked as the sole staff at the newly created Bowling Green office for thirty days during the summer of 1987. *See* Trial Tr. at 357. Additionally, Fritz testified he was out on sick leave when the file was transferred. *See id.* While it is unclear how long Fritz was on sick leave before the file was transferred, the time it took Fritz to conduct the Ford investigation, given Fritz's overlapping obligations, cannot be found by this Court to be unreasonable.

Also, with respect to the evidence proffered by Ford concerning the delays in the investigation under Kyle, the Court finds Ford has not shown there were unreasonable delays in the investigation. Ford essentially argues the only reason Kyle could not expeditiously close out the investigation was due to delays by McNally. Kyle admitted, however, that although he primarily needed information from McNally to complete the investigation, he also needed to interview four or five witnesses. *See* Trial Tr. at 409-10. Evidence in the record shows Kyle did not interview at least two of these witnesses until the end of 1989Cwell past the last extension for liquidation in October 1988.<sup>31</sup> Thus, even if McNally had supplied information to Kyle more expeditiously,<sup>32</sup> Ford does not point to evidence which indicates Kyle could

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<sup>31</sup> Kyle testified he interviewed one witness, George Birkholtz, on or about November 8, 1989, *see* Trial Tr. at 413; Pl.'s Ex. 41-9, and a second witness, Nancy Pohl, on or about December 28, 1989. *See* Trial Tr. at 417; Pl.'s Ex. 38.

<sup>32</sup> Although it appears McNally may not have acted expeditiously, evidence on the record does not support the forcefulness of plaintiff's contention. First, Kyle testified that prior to sending out the written memo in March 1989, he contacted McNally from "time to time," Trial Tr. at 390, or "periodically," Trial Tr. at 441. While the Court does not question that Kyle contacted McNally during this period, on the basis of Kyle's testimony, it is unclear how often Kyle contacted McNally prior to his sending the memorandum. *See* Trial Tr. at 391. It is clear, however, that no other written request was made before March 1989. *See* Trial Tr. at 442-43. Second, Kyle testified McNally told him he did not work on the Ford matter for seven to eight months during this time because he had "other work." Trial Tr. at 390-91. While having other work may not excuse McNally's failure to respond indefinitely, it is not necessarily unreasonable for McNally to delay his responses for a few months in light of other work priorities. Thus, the evidence presented by plaintiff is not sufficient to indicate the investigation could have been completed prior to the October 1988 extension based solely on McNally's alleged delays.



have completed the investigation without interviewing the additional witnesses.<sup>33</sup> Also, the Court finds it was not unreasonable for Kyle not to have conducted the interviews sooner in the investigative process as he had a heavy caseload and had numerous responsibilities in connection with setting up the Bowling Green office during the time in which he was assigned to the case. *See* Trial Tr. at 429-32. In light of all the evidence and noting that Kyle still had to interview additional witnesses before he could complete the investigation, notwithstanding McNally's apparent inaction, this Court cannot find, as a matter of law, Ford has shown the amount of time taken to complete the investigation was unreasonable or that the investigation could or should have been completed sooner. Although it is unclear how long an extension would be reasonable, this Court cannot conclude that, based on the facts before it, the delay was so great as to constitute an abuse of discretion, thereby invalidating the extensions.

*B. Clerical Errors Under 19 U.S.C. § 1520(c)(1)*

Alternatively, Ford contends its failure to pay duties before entering the engines and transmissions into the Louisville FTSZ and its designation of those parts as NPF instead of PD are correctable under 19 U.S.C. § 1520(c)(1).<sup>34</sup> Section 1520(c)(1) permits the reliquidation of an entry to correct for, among other things, clerical error, if the claim is timely made.<sup>35</sup> *See B.S. Livingston & Co. v. United States*, 13 CIT 889, 891 (1989). This Court has found section 1520(c)(1) is not a remedy for every conceivable mistake or inadvertence but rather offers "limited relief in the situations defined therein." *PPG Indus.*, 7 CIT at 123 (citations and quotations omitted). Section 1520(c)(1) only permits relief when the "clerical error" does not amount to an "error in the construction of the law." *Occidental Oil & Gas Co. v. United States*, 13 CIT 244, 246 (1989). The party seeking to correct the error must show that its error fits within one of the statutory categories. *See Ford II*, 157 F.3d at 857. Thus, in order for Ford to prevail on this issue, it must show that its alleged errors are correctable under section 1520(c)(1).

<sup>33</sup> Although Ford notes Kyle stated these witnesses were "peripheral" to his investigation and did "not hav[e] anything to do with the direct submission of the entries," (Pl.'s Post-Tr. Br. at 18-19 n.15 (quoting Trial Tr. at 405)), such statements are not dispositive as to whether the interviewer could elicit unsolicited information during the interview. As the Court pointed out at trial and Kyle agreed, *see* Trial Tr. at 418, when an individual interviews a witness with a preconceived notion as to what the individual expects to elicit from the witness, such expectations are not controlling as to what the witness ultimately states. Thus, merely because the purpose of the interview was narrow is not controlling as to what may ultimately be revealed. Moreover, Ford does not show Kyle could have closed out the investigation without conducting the interviews. Indeed, Kyle testified that he "needed to talk to [the witnesses he interviewed] . . . to find out what verbal directions were given to Ford Motor Company" "before [he] wrapped up the case." Trial Tr. at 406-07.

<sup>34</sup> Section 1520(c)(1) states, in pertinent part:

Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction . . . .

19 U.S.C. § 1520(c)(1). The regulation implementing section 1520(c)(1) essentially mirrors the statutory language. *See* 19 C.F.R. § 173.4(b) (1985).

<sup>35</sup> There is no cause of action before this Court that the claim was not timely made.



A clerical error is a mistake made by a clerk or other subordinate upon whom “no duty devolved to exercise original thought or judgment.” *S. Yamada v. United States*, 26 CCPA 89, 94 (1938). The Federal Circuit stated in its opinion remanding this case for trial that “[w]hen a subordinate is given binding instructions on particular aspects of a task, no duty devolves upon him to exercise discretion or judgment in carrying out those aspects.” *Ford II*, 157 F.3d at 860. Thus, *Yamada* teaches that “a subordinate acting contrary to binding instructions commits a clerical error.” *Id.* Even if the importer establishes the presence of a “clerical error,” “Customs may show that the error is not correctable [under § 1520(c)(1)] by showing that a noncorrectable error of those who did have discretion in the matter contributed to the mistake.” *Id.*

In remanding this case for trial, the Federal Circuit found “[t]he record raises material issues of fact that bear on whether Tullock’s mistakes are correctable.” *Id.* at 861. Specifically, the Federal Circuit stated (1) “the record shows a dispute over whether Tullock’s supervisors provided him with complete instructions, *i.e.*, instructions covering and binding Tullock in the aspects in which he erred” and (2) “the record shows a dispute over whether Tullock’s supervisors made uncorrectable contributing errors, so as to preclude the correction of what otherwise might be correctable errors on the part of Tullock.” *Id.*

To demonstrate that Tullock committed “clerical errors,” Ford must prove he was given “complete, binding, non-discretionary instructions” to the following effect:

For every car part entering the FTSZ, Tullock was to check the “non-privileged foreign” box on a CF214, and after the car was assembled, complete CF7501 and pay a 2.6% duty. For every truck part arriving at the FTSZ, he was to check the “privileged domestic” box on a CF214, and immediately complete CF7501 and pay a 3.3% duty.

*Id.* (emphasis omitted).

Ford argues Tullock committed clerical errors because the record reflects Tullock received clear, complete, and binding instructions regarding the designation of the zone status of the merchandise and the timing of duty payment from which Tullock had no discretion to deviate, and Tullock acted contrary to those binding instructions. To show Tullock received clear and complete instructions, Ford points to the following evidence: (1) the Ford FTSZ manual; (2) other materials Tullock received during his training; and (3) oral instructions from Lars Anderson, the Ford staff FTSZ coordinator. As proof that Tullock understood those instructions, Ford points to two memoranda from Tullock in 1985 to William Kuchenbrod, Tullock’s general supervisor in Louisville, and J.T. Wingart, a Materials Manager at the plant, and to evidence that he orally communicated his understanding of the

instructions to Anderson. Further, Ford points to the following evidence to show the instructions were binding: (1) testimony of Alan Moody, Supervisor of Ford's Customs Department and overseer of the FTSZ program, stating Tullock had no discretion regarding the designation of zone status and payment of duties on car and truck parts, including the timing of the duty payments; (2) testimony of Anderson stating that Tullock had no discretion to make an entry; and (3) testimony of Kuchenbrod stating that Tullock had no discretion to decide which engine or transmission went into Broncos or Rangers.

Ford also argues that the record establishes Tullock was well-trained and well-supervised, thus indicating Tullock's errors were one correctable under section 1520(c)(1). Plaintiff points to evidence that Anderson was in close contact with Tullock regarding his FTSZ duties and reviewed documents with Tullock, including the FTSZ manual and other FTSZ documents. Additionally, Tullock could contact Anderson or Moody if he had questions or concerns. *See* Trial Tr. at 567. Ford points to evidence that Anderson visited Tullock at the Louisville plant particularly when the FTSZ record system was being created and the FTSZ was being activated. *See* Trial Tr. at 560, 566; *see also* Pl.'s Ex. 75 at 210. Ford also emphasizes the training Tullock received and points to evidence that Tullock visited other FTSZs such as Wayne, Michigan and Wixom, Ohio and saw how the FTSZs operated first-hand. *See* Trial Tr. at 562-63. Thus, Ford argues, Tullock was well-trained and well-supervised and only needed to follow the "clear and binding instructions" he was given. (Pl.'s Post-Tr. Br. at 30.) That Tullock failed to do so, Ford argues, constitutes "clerical errors" which are correctable under section 1520(c)(1).

The government claims Tullock's errors were not "clerical errors" under 19 U.S.C. § 1520(c)(1) because the instructions provided Tullock were not complete in that they did not include instructions on interchangeable parts. Essentially, the government argues even if Tullock were aware of the differences between PD and NPF status and the timing of duty payments for goods in these statuses, he nonetheless lacked the awareness of "how to place the specific goods arriving in Louisville in the proper status or how to pay duties at the appropriate time for those goods." (Def.'s Reply to Pl.'s Post-Tr. Br. at 8 (emphasis omitted).) The critical point missing from Tullock's instructions, the government contends, was how Tullock was supposed to determine, for the interchangeable parts, which parts were for trucks and which were for cars before the parts entered the FTSZ. As no system existed at the Louisville plant by which interchangeable car and truck parts could be distinguished as they arrived, there was no way for Tullock to carry out any binding instructions. Further, the government argues Ford was otherwise responsible for Tullock's errors because Ford improperly trained and supervised Tullock in his capacity as the FTSZ Coordinator. Thus, according to the government, the errors committed by Tullock cannot be corrected under 19 U.S.C. § 1520(c)(1).

After consideration of the parties' arguments and the evidence ad-

mitted at trial, this Court finds Ford did not commit “clerical errors” that would allow it relief under 19 U.S.C. § 1520(c)(1). Regarding whether Tullock received clear and complete instructions, the evidence to which Ford points establishes the following. First, Ford points to a document identified as Ford’s manual for supervising a foreign trade zone. It is entitled, “Ford Foreign Trade Subzone: Louisville Assembly Plant.” *See* Pl.’s Ex. 59. Although the document discusses some aspects of the operating procedure for a subzone and the reporting requirements of a FTSZ Coordinator, the document does not explain what is to be done with PD merchandise, nor does it associate PD status with trucks, nor does it explain the timing of the payments.

Second, Ford points to oral instructions given by Lars Anderson. *See* Pl.’s Ex. 75 at 13. While Anderson’s deposition testimony confirms that he gave verbal instructions to Tullock, it only indicates specifically that he instructed Tullock regarding when PD was to be used (for trucks) and when payment for PD status was to be made (“up front”). *See* Pl.’s Ex. 75 at 244. Though Moody attempted to clarify at trial what other instructions might have been given by Anderson to Tullock<sup>36</sup>, Moody was not in a position to testify as to the exact content of those instructions.<sup>37</sup> Thus, Moody’s testimony does not assist the Court further in understanding whether Tullock received complete instructions.

Perhaps the best evidence that Tullock, at least in part, received instructions and understood the procedures are the memoranda sent by Tullock to William Kuchenbrod, his immediate supervisor, and J.T. Weingart. Tullock’s memorandum to Kuchenbrod states, in pertinent part:

We must then establish a beginning inventory on the controlled parts with the assistance of customs personnel. At this time, all

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<sup>36</sup> For example, Moody testified, in relevant part:

Q. So are you saying that Mr. Tullock was given specific instructions as to the specific zone status to declare on car parts and the specificB

A. Oh, yes.

Q. Bspecific zone at that time to pay on truck parts?

A. Yes.

Q. And pay duty on those respective parts?

A. Yes.

....

The Court: Can you tell me who gave [the instructions] to [Mr. Tullock]?

The Witness: Almost certainly Lars Anderson.

....

The Court: And do you know exactly what those instructions were, or do you just know in substance what you believe?

The Witness: I know the substance of them, what they should have been.

The Court: You don’t know exactly what the instructions were?

The Witness: I have not seen or written a piece of paper that B that would have conveyed this to Tullock.

Trial Tr. at 570-72.

<sup>37</sup> Although there is evidence Moody was “closely apprised” of Ford’s FTSZ activities by Anderson, *see* Trial Tr. at 558-59, there is no evidence to indicate Moody had any reliable basis for knowing exactly what might have been communicated between Anderson and Tullock while the FTSZ was being established at the Louisville plant.

inventory on hand including all inventory released at port of entry will be considered PD material; that is, material on which all required duty has been paid. I will open entries on the NPF Master covering each part. Division Traffic will then have to notify carriers that subsequent receivals of controlled parts must travel under bond from port into our plant.

As these subsequent receivals enter the subzone, I will pay duty ” \$.033 and request immediate transfer from zone on controlled material to be used in Ranger production. As units are produced, I will pay duty ” \$.026 on material used in Bronco production.

Pl.’s Ex. 62-1. Tullock’s memorandum to Weingart states, in pertinent part, “Duty will be paid on such material for producing Rangers as it arrives in the zone. It will be paid on Bronco materials as they are produced.” Pl.’s Ex. 64. At minimum, these memoranda indicate Tullock had an understanding of the correct duty rates and the correct timing of the payment for the rates for each vehicle. The memoranda, however, do not indicate Tullock received instruction on or had an understanding that truck parts should be given the designation of PD nor that car parts should be designated NPF.<sup>38</sup> Further, the memoranda do not indicate Tullock received instruction on or had an understanding of whether or when markings on CF 214s should be made nor when or how Tullock was to complete CF 7501s.

More importantly, however, although the memorandum to Kuchenbrod identifies seven interchangeable parts to be controlled,<sup>39</sup> the memorandum does not indicate how the interchangeable parts were to be divided between truck parts and car parts when the parts entered the FTSZ. Kuchenbrod testified that if a part arriving at the plant were interchangeable between cars and trucks, there would be no way to know at the time the part entered the FTSZ for which vehicle that part was destined prior to production, and there was no separate section designated for truck parts or car parts in the FTSZ.

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<sup>38</sup> Although Tullock’s memorandum to Kuchenbrod mentions “PD material” and mentions that such material is that “on which all required duty has been paid,” there is nothing in the memorandum which indicates any time payment is made when the parts enter the FTSZ, the parts should be given “privileged domestic” (PD) status. Consequently, the Court cannot infer from the language in this memorandum that Tullock understood that truck parts should be given PD status.

<sup>39</sup> Kuchenbrod testified that each of the parts listed on Pl.’s Ex. 62-2 were either engines or transmissions and that each appeared to be next to a designation for either a Bronco or a Ranger. See Trial Tr. at 474. Kuchenbrod confirmed that it appears at least these seven parts were interchangeable. See Trial Tr. at 471.

See Trial Tr. at 467-68. Moreover, although Ford Headquarters identified how many trucks and cars were to be produced and that information was downloaded at the Louisville plant,<sup>40</sup> for those parts which were interchangeable, it appears there was no way to determine their destination when the parts entered the FTSZ until after the parts were incorporated into the appropriate vehicles.<sup>41</sup> See, e.g., Trial Tr. at 468-70.<sup>42</sup> The Court finds the instructions given to Kuchenbrod as to how many trucks or cars should come off the production line each day was not tantamount to instructions to Tullock as to which engines or transmissions should be used for cars or trucks when the parts entered the FTSZ. Indeed, it appears to the Court, there were no instructions at all to Tullock as to when and how he was to declare the interchangeable parts for cars or trucks when they entered the FTSZ.

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<sup>40</sup> Kuchenbrod testified, in relevant part:

Q. Can you tell us how it was that it was determined whether a particular engine or transmission would go into a Ranger versus a Bronco?

A. It was based on the production schedules. The production schedules were B were downloaded to us . . . I don't remember at that time whether it was in three-day buckets, we call them, or five-day buckets.

But whichever, it was downloaded to the plant from Detroit. Here is what you will get for the next three days or five days, whichever the case may be.

. . . So, at the beginning of the week when they downloaded this bucket of schedules that says you are going to build this many trucks, this many Broncos, this many Rangers, and here are the VIN numbers, here is the serial number, each truck was downloaded to be built was already B already had an identity and already had a bill of material how it was going to be built.

Trial Tr. at 454-55.

<sup>41</sup> The evidence suggests there were some engines and transmissions unique to either cars or trucks. See Trial Tr. at 536-37. Where the parts were unique to either cars or trucks, it appears Tullock would have been able to identify which parts would be destined for trucks and which for cars as Tullock was familiar with Ford parts numbers for engines and transmissions, as the only parts chaser at the Louisville plant chasing engines and transmissions. See Trial Tr. at 546-47. It is unclear, however, what percentage, if any, of controlled parts under the FTSZ were unique. See Trial Tr. at 536.

<sup>42</sup> Kuchenbrod testified, in relevant part:

The Court: [W]hen you walk into the area where the materials are for the making of the vehicles, prior to going to the head of the production line, you wouldn't know whether or not this was a truck part or a car part?

The Witness: No, Sir . . .

The Court: Would Mr. Tullock have known and you not know?

The Witness: No, Sir, he wouldn't.

. . . .

The Court: Why would nobody know?

The Witness: Because you know you need 800 engines for today. We set 800 engines on the line. As the cars or the trucks, whatever, comes by, the operator that decks engines goes and gets one of them and puts them in that vehicle that calls for it.

The Court: So, it is a great big group of 800 engines?

The Witness: Yes.

The Court: So B

The Witness: And used, as required, as the jobs go down the line.

The Court: And to the best of your knowledge, nobody keeps track of the difference between the truck engines and the car engines?

The Witness: Not in the production area, no, sir.

The Court: Do they keep track of them any other place that you know of?

The Witness: The material could be retrieved after the fact, after the engine was installed and was married up to a vehicle identification number, after the fact. Yes, Sir.

The Court: But B

The Witness: Not before.

The Court: Not before?

The Witness: No, sir.

Trial Tr. at 468-70.

Moreover, it does not appear Tullock received instructions on how to handle the interchangeable parts as they arrived at the FTSZ through his on-site training. As part of Tullock's training, he met with other Ford FTSZ Coordinators and reviewed the paperwork to learn how to maintain an appropriate record keeping system. *See* Trial Tr. at 562-63. The other FTSZs which Tullock visited, however, did not, like the Louisville FTSZ, have interchangeable parts. *See* Trial Tr. at 619 and 621-22. Thus, it is clear Tullock did not receive adequate training or instruction on how to handle the interchangeable parts at the point they entered the FTSZ. Even if the Court were willing to infer that when the instructions were given, the instructions were binding, and Tullock had no discretion to deviate from them, *see* Trial Tr. at 578 and 581; Pl.'s Ex. 75 at 244, for this Court to conclude that Tullock received *complete instructions and training* on how to handle the imported engines and transmissions when they arrived at the Louisville FTSZ based on the evidence presented at trial is a leap this Court is simply unwilling to make.

Moreover, even if Tullock had received sufficient instructions and training, the record suggests Tullock was not adequately supervised and that lack of supervision may have contributed to his errors. According to the Federal Circuit in its opinion remanding this case for trial, "if negligent supervision was a contributing factor to Tullock's error, the error is not correctable under section 1520(c)(1)." *Ford II*, 157 F.3d at 863. First, there appears to be some question regarding who was actually supervising Tullock. Kuchenbrod testified he did not supervise Tullock with respect to his customs-related duties as FTSZ Coordinator, and he believed Moody and Anderson had adequately trained him and were available to answer his questions. *See* Trial Tr. at 460-61. Anderson, however, testified that Kuchenbrod was Tullock's supervisor. *See* Defendant's Exhibit (Def.'s Ex.) N at 36-37. Kuchenbrod, however, had not been trained in the foreign trade zone activities, *see* Trial Tr. at 459, and knew almost nothing about Tullock's FTSZ responsibilities. *See, e.g.,* Trial Tr. at 460. This lack of supervision, Anderson suggests and this Court finds, appears to have had a direct impact on the ability of Tullock to carry out his instructions.<sup>43</sup>

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<sup>43</sup> For example, Anderson had instructed Tullock to create a "NPF Master" based on the number of control parts used in the Bronco IIs as reflected in the Transaction Register and a production report. *See* Defendant's Exhibit (Def.'s Ex.) N at 48-49. Anderson apparently explained to Tullock how to transfer information from the Transaction Register to the "NPF Master" by phone. *See* Def.'s Ex. N at 52. When realizing Tullock had erroneously filled out the "NPF Master" a realization which first materialized on January 2, 1986, *see* Def.'s Ex. N at 81, and for which Tullock apparently still needed help as of February 18, 1986, *see id.* at 83C Anderson stated the reason there was a problem for such an extended period of time was "[b]ecause [Tullock] was working independently and his need for help hadn't been guided by anybody from the home office, so to speak." Def.'s Ex. N at 83.



Second, those who were allegedly supervising and training Tullock on his FTSZ activities, Anderson and Moody, apparently were not aware some of the parts to be controlled in the Louisville FTSZ were interchangeable between trucks and cars. *See* Trial Tr. at 612-15. Moody specifically testified that “at the time we activated the [FTSZ in Louisville], I was not aware if there were any [controlled common usage parts].”<sup>44</sup> Trial Tr. at 612-13. Anderson testified that, to the best of his knowledge, prior to his deposition testimony on July 27, 1994, he did not understand that there were commonality of usage of the same parts in trucks and cars at the Louisville FTSZ. *See* Def.’s Ex. N at 255<sup>45</sup>; *see also* Trial Tr. at 618 (Moody “presuming” Anderson was not aware there were interchangeable parts at the Louisville FTSZ). Moreover, Tullock testified Anderson did not assist him in trying to set up a paperwork system in Louisville differently from the FTSZs he had visited to extrapolate what the other zones had been doing to what he was expected to do at Louisville. *See* Trial Tr. at 705. Thus, as Tullock’s “supervisors” for his work as FTSZ Coordinator did not know there were interchangeable controlled parts at the Louisville FTSZ, Tullock could not have been adequately supervised on how to designate those parts and account for them upon their entrance into the FTSZ. Notwithstanding Ford’s arguments, this Court finds it was Ford’s duty to file accurately the entries, timely pay the duties, and accurately claim PD or NPF status on the appropriate parts. Ford is a sophisticated corporation that reasonably could be expected to prepare entry documents with accuracy.

#### IV. CONCLUSION

For the reasons stated above, this Court finds Ford has not put forth sufficient evidence to satisfy its burden of showing, pursuant to *St. Paul*, 6 F.3d at 768, that it was unreasonable for Customs to extend liquidation on the premise that information needed for the proper appraisal or classification of the merchandise was not available to the appropriate customs officer and that the fraud investigation was

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<sup>44</sup> The Court notes nevertheless that a memorandum discussing a proposed inventory control system which was apparently prepared by Moody in July 1984 contemplated that articles of common usage, including engines and transmissions, would be employed at the Louisville FTSZ. This proposed inventory control system was rejected by Customs. *See* Trial Tr. at 644.

<sup>45</sup> Anderson specifically testified:

Q. Prior to [the deposition on July 27, 1994], . . . was it not your understanding that there was no commonality of usage of the same part in a truck and automobile in the Louisville plant?

A. That’s right. Yeah.

. . . .

Q. To the best of your knowledge and recollection, is it your B was that your understanding back in the period from 1985 to 1987?

A. Yes. I would say that’s true.

Def.’s Ex. N at 255.

not reasonably expected to produce information about appraisement or classification. Additionally, this Court finds Ford has not put forth sufficient evidence to satisfy its burden of showing the length of Customs's extensions was unreasonable. Thus, this Court rejects Ford's contention Customs had no legal basis for extending liquidation and holds Customs did not abuse its discretion in extending liquidation on three separate occasions pursuant to 19 U.S.C. § 1504(b)(1). Additionally, this Court finds Ford has failed to prove Tullock committed correctable clerical errors and, therefore, holds 19 U.S.C. § 1520(c)(1) offers no relief to Ford in this case. Accordingly, this action is dismissed.

Gregory W. Carman,  
*Chief Judge*

Dated: August 21, 2000  
New York, New York

(Slip Op. 00-104)

ROLLERBLADE, INC., PLAINTIFF, V. UNITED STATES, DEFENDANT

Court No. 97-12-02097

[Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment granted. Judgment entered for Defendant.]

Decided: August 21, 2000

*Powell, Goldstein, Frazer & Murphy, (Robert Torresen, Jr., Susan M. Mathews, Leigh Fraiser)* for Plaintiff.

*David W. Ogden*, Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, *Amy M. Rubin*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Sheryl A. French*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel, for Defendant.

## OPINION

POGUE, *Judge*: Plaintiff, Rollerblade, Inc. ("Rollerblade"), challenges a decision of the United States Customs Service ("Customs") denying Rollerblade's protests filed in accordance with section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (1994). At issue is the proper tariff classification under 19 U.S.C. § 1202 (1994), Harmonized Tariff Schedule of the United States ("HTSUS"), of Rollerblade's imports of certain roller skating protective gear.

Rollerblade claims that the subject merchandise is classifiable under subheading 9506.70.2090, HTSUS (1996), covering:

Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: . . . Ice skates and roller skates, including skating boots with skates attached; parts and accessories thereof: Roller skates and parts and accessories thereof: . . . Other

Goods classifiable under subheading 9506.70.2090, HTSUS, were subject to duty-free entry in 1996, the year in which the subject imports were entered in the port of Minneapolis.

Customs classified the merchandise under a residual or "basket" provision, subheading 9506.99.6080, HTSUS, covering:

Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: . . . Other: . . . Other: . . . Other: . . . Other

Goods classifiable under subheading 9506.99.6080, HTSUS, were subject to a general rate of duty of 4.4 % *ad valorem* in 1996.

Jurisdiction is predicated on 28 U.S.C. § 1581(a)(1994); therefore, Customs' classification is subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994). This action is before the Court on summary judgment motions made by Rollerblade and Defendant, the United States, pursuant to USCIT Rule 56.<sup>1</sup> It has been designated a test case pursuant to USCIT Rule 84.

#### STANDARD OF REVIEW

Under USCIT Rule 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court must address whether Customs' classification determination is reviewable as a matter of law. The Court analyzes a Customs classification issue in two steps: "first, [it] construe[s] the relevant classification headings; and second, [it] determine[s] under which of the properly construed tariff terms the merchandise at issue falls." *Bausch & Lomb v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998)(citing *Universal Elecs. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)). Whether the subject merchandise is properly classified is ultimately a question of law. *See id.* Summary judgment of a classification issue is therefore appropriate "when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is."<sup>2</sup> *Id.*

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<sup>1</sup>Rollerblade contends that the United States' summary judgment cross-motion should be considered a response to Rollerblade's summary judgment motion rather than a cross-motion for summary judgment, because the United States filed its cross-motion after the deadline had passed on the Court's Scheduling Order for the filing of dispositive motions. *See* Pl.'s Reply to Def.'s Resp. at 1 n.1. The parties did not, however, specify in the Scheduling Order that all dispositive motions must be filed concurrently. The practice of combining the cross-motion for summary judgment with the party's response to the original motion for summary judgment is an efficient use of court resources. The Court accepts the United States' cross-motion for summary judgment as such.

<sup>2</sup>Following the Federal Circuit's holding in *Mead Corp. v. United States*, 185 F.3d 1304, 1306-07 (Fed. Cir. 1999), *cert. granted*, 68 U.S.L.W. 3566 (U.S. May 30, 2000)(No. 99-1434), the Court does not afford the deference articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984), to Customs' standard classification rulings. Moreover, although there is a statutory presumption of correctness, *see* 28 U.S.C. § 2639(a)(1), that attaches to Customs' classification decisions, that presumption is not relevant where the Court is presented with a question of law in a proper motion for summary judgment, *see Universal Electronics*, 112 F.3d at 492.

Here, the parties agree that “[t]he imported merchandise consists of Rollerblade protective gear for in-line skating, including elbow pads, knee pads and wrist guards.”<sup>3</sup> Pl.’s Statement Pursuant to Rule 56(i) (“Pl.’s Stmt.”) at ¶ 1; *see also* Def.’s Resp. to Pl.’s Stmt. at ¶ 3. Thus, Rollerblade and the United States simply disagree as to how the merchandise should be classified. Summary judgment of the classification issue is therefore appropriate.

#### DISCUSSION

The HTSUS consists of (A) the General Notes; (B) the General Rules of Interpretation; (C) the Additional U.S. Rules of Interpretation; (D) sections I to XXII, inclusive (encompassing chapters 1 to 99, and including all section and chapter notes, article provisions, and tariff and other treatment accorded thereto); and (E) the Chemical Appendix.

General Rule of Interpretation (“GRI”) 1 for the HTSUS provides that, “for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes . . . .” GRI 1, HTSUS; *see also Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998); Harmonized Commodity Description and Coding System, Explanatory Notes (1<sup>st</sup> ed. 1986) (“Explanatory Notes”)<sup>4</sup> at 2 (“[T]he terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification.”). Here, the parties agree that the subject imports should be classified under heading 9506, HTSUS, but dispute the correct subheading. Therefore, the Court reviews the parties’ proposed classifications pursuant to GRI 6. *See* GRI 6, HTSUS (“For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the [GRIs], on the understanding that only subheadings at the same level are comparable.”).

Rollerblade argues that the imported goods are accessories to in-line roller skates, and therefore, are correctly classified under the provision for “roller skates and parts and accessories thereof,” in subheading 9506.70.2090. *See* Pl.’s Mot. Summ. J. at 6. The United States responds that the imported goods are not accessories to roller skates, but are rather roller skating equipment. *See* Def.’s Mot.

<sup>3</sup>Protective helmets worn by in-line skaters are not at issue. *See* Pl.’s Mot. Summ. J. at 7.

<sup>4</sup>The Explanatory Notes “provide a commentary on the scope of each heading of the Harmonized [Tariff] System and are thus useful in ascertaining the classification of merchandise under the system.” H.R. Conf. Rep. No. 576, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 549 (1988). It has long been settled that, “[w]hile the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTS[US] subheadings.” *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

Summ. J. at 2. Because there is no specific provision for roller skating equipment in the HTSUS, the United States concludes that Customs' classification of the merchandise as "other" sports equipment under the basket provision of subheading 9506.99.6080 was correct. *See id.* at 2-3; *see also* HQ 959376 (Sept. 3, 1996)(modifying HQ 957396 (Dec. 12, 1994) and NY 895546 (Mar. 28, 1994)).

Classification of imported merchandise in a basket provision is only appropriate if there is no tariff category that covers the merchandise more specifically. *See EM Indus. v. United States*, 22 CIT \_\_, \_\_, 999 F. Supp. 1473, 1480 (1998)("Basket' or residual provisions of HTSUS Headings . . . are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading."); *EM Chems. v. United States*, 20 CIT \_\_, \_\_, 923 F. Supp. 202, 206 (1996). *See also* GRI 3(a), HTSUS ("The heading which provides the most specific description shall be preferred to headings providing a more general description."). Therefore, the Court must first address whether the imported goods are more specifically classifiable under subheading 9506.70.2090, HTSUS. The precise issue before the Court, then, is whether Rollerblade protective gear constitutes accessories to skates. If the protective gear does not constitute accessories to skates, then the Court must consider whether Customs correctly classified the subject goods under subheading 9506.99.6080, HTSUS, as "other" sports equipment.

#### I. Whether Rollerblade protective gear constitutes accessories to skates

As recognized by both parties, neither the HTSUS nor its legislative history defines "accessory." *See* Pl.'s Mot. Summ. J. at 7-8; Def.'s Mot. Summ. J. at 4. *See also* HQ 958924 (June 20, 1996). "When a tariff term is not defined in either the HTSUS or its legislative history, the term's correct meaning is its common meaning." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)(citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992)). To determine the common meaning of a tariff term, "[a] court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities[.]" *Id.* (citing *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988)). "Additionally, a court may refer to the Explanatory Notes of a tariff subheading . . ." *Id.* (citing *Lynteq*, 976 F.2d at 699).

The parties agree that the common meaning of the term "accessory" should be applied by the Court. *See* Pl.'s Mot. Summ. J. at 7; Def.'s Mot. Summ. J. at 4. Rollerblade provides several dictionary definitions, *see* Pl.'s Mot. Summ. J. at 8-9:

something extra added to help in a secondary way; specif., a) an article to complete one's costume, as a purse, gloves, etc. b) a piece of optional equipment for convenience, comfort, etc.



*Webster's New World Dictionary of the American Language* 4 (2d Concise Ed. 1978).

- 1.a A thing of secondary or subordinate importance; adjunct;
- 1.b An object or device not essential in itself but adding to the beauty, convenience or effectiveness of something else.

*Webster's Collegiate Dictionary* 7 (2d Ed. 1977).

A subordinate or supplementary part, object or the like, used mainly for convenience, attractiveness, safety, etc.

*Random House Webster's Unabridged Dictionary* 11 (2d ed. 1998).

Additional or subordinate thing, adjunct; article not absolutely essential that adds to the attractiveness, convenience, effectiveness, or safety of something else.

*Scribner-Bantam English Dictionary* 7 (1991).

- 1.a A subordinate or supplementary item; an adjunct.
- 1.b Something non-essential but desirable that contributes to an effect or result.

*American Heritage Dictionary* 10 (3d ed. 1996).

The United States notes that Customs also interprets the term "accessory" according to its common meaning, and cites to a representative Headquarters Ruling:

We have noted that the term "accessory" is not defined in either the HTSUSA or the Explanatory Notes to the Harmonized System (EN). We, however, have repeatedly noted that an accessory is, in addition to being an article related to a primary article, is [sic in original] used solely or principally with that article. We have also noted that an accessory is not necessary to enable the goods with which they are used to fulfill their intended function. They are of secondary importance, not essential of themselves. They, however, must contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation). We have also noted that Webster's Dictionary defines an accessory as an object or device that is not essential in itself but adds to the beauty, convenience, or effectiveness of something else.

HQ 958924 (June 20, 1996)(citations omitted)(quoted in Def.'s Mot. Summ. J. at 5).

While Rollerblade and the United States agree that the common meaning of the term "accessory" should be used, they disagree as to whether the imported merchandise is properly considered accessories to roller skates. Rollerblade asserts that the protective gear is an accessory to roller skates because it is designed, tested, manufactured and marketed solely for use with in-line skates. See Pl.'s Mot.

Summ. J. at 9. In sum, the gear has “no function independent of [its] relationship to the skates.” *Id.* at 10. Therefore, according to Rollerblade, the gear is “supplementary,’ ‘secondary,’ ‘additional,’ ‘subordinate,’ and otherwise related to in-line roller skates,” and comes within the common meaning of “accessory.” *Id.* at 9.

The United States argues that the protective gear is not an accessory to roller skates. According to the United States, Rollerblade’s interpretation of the term “accessory” fails to account for a key element of the definition: “‘Accessory’ is not defined as something that is merely intended to be used at the same time as something else; accessories must serve a purpose subordinate to, but also **in direct relationship** to the thing they ‘accessorize.’” Def.’s Mot. Summ. J. at 5-6 (emphasis in original). The United States asserts further that, although the protective gear is designed, tested, and marketed solely or principally for use at the same time as in-line skates,<sup>5</sup> see Def.’s Resp. to Pl.’s Stmt. at ¶¶ 7-10, the protective gear does not relate directly to roller skates because the gear “has no effect on whether or how well the skates themselves will perform.” Def.’s Mot. Summ. J. at 6.

The Court agrees with the United States the common meaning of the term indicates that an accessory must relate directly to the thing accessorized. Indeed, the definitions cited by Rollerblade indicate that an accessory exists only in relation to some other *thing*.<sup>6</sup> Two of the definitions do not explicitly refer to the relation between an accessory and another thing, but do support the United States’ position. First, the *Webster’s New World* definition does not make sense if read as Rollerblade suggests: “something extra added [to the skater] to help [the skates] in a secondary way.” *Webster’s New World Dictionary* at 4. What is added to the skater does not help the skates. Second, the *Random House* definition continues with the following examples of an “accessory” that emphasize the relationship to another thing: “a spotlight on an automobile or a lens cover on a camera.” *Random House Webster’s Unabridged Dictionary* at 11. In

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<sup>5</sup>Rollerblade asserts, and the United States does not dispute, for purposes of the case at bar, that the protective gear is equipment used exclusively for in-line skating. See Pl.’s Mot. Summ. J. at 14-16; Def.’s Mot. Summ. J. at 2-3. None of the evidence presented to the Court indicates that the protective gear at issue is generic protective gear that could be used for several sports.

<sup>6</sup>See *Webster’s College Dictionary* at 7; *Scribner-Bantam English Dictionary* at 7; *American Heritage Dictionary* at 10 (referring to an “adjunct,” which is “[s]omething joined to something else and auxiliary to or dependent on it,” see *The New Shorter Oxford English Dictionary* 27 (1993)).

addition, the unabridged *Oxford English Dictionary* defines “accessory” as follows: “*Of things*: Coming as an accession; contributing in an additional and hence subordinate degree; additional, extra, adventitious.” *Oxford English Dictionary* 74 (2d ed. 1989)(emphasis added). Rollerblade itself states that the required showing under the common meaning of the term accessory is that “an article is ‘supplementary,’ or ‘secondary’ or ‘subordinate’ to some other article.” Pl.’s Mot. Summ. J. at 10 (emphasis added).

Moreover, the language of heading 9506, HTSUS, refers to accessories either in relation to “articles and equipment” generally, as in subheading 9506.40.00 (“Articles and equipment for table-tennis, and parts or accessories *thereof*”), or to the specific article named, as in subheading 9506.70, HTSUS (“Ice skates and roller skates, including skating boots with skates attached; parts and accessories *thereof*”). (Emphases added.) The language of the HTSUS reflects the common understanding that accessories must be “of” or “to” another thing.

Rollerblade has failed to convince the Court that its imported merchandise “accessorizes” roller skates in accordance with the common meaning of that term. Although Rollerblade claims that the protective gear is “otherwise related” to in-line roller skates as articles or equipment, *see* Pl.’s Mot. Summ. J. at 9, Rollerblade has not succeeded in demonstrating a direct relationship between the protective gear and the roller skates themselves. Rollerblade’s arguments rather support the conclusion that the primary relationship is between the protective gear and the activity of roller skating. For example, Rollerblade claims that the protective gear is an accessory because it “is designed, tested and manufactured for use with in-line skates,” Pl.’s Mot. Summ. J. at 9, but describes the function of the gear as that of “protect[ing] the wearer from skating related injury,” *id.* The marketing of the protective gear also emphasizes the benefits of the gear to one engaged in in-line skating. *See id.* at 9-10.

Rollerblade’s next claim is that “protective gear increases the safety, comfort and effectiveness of in-line roller skates and expands their range of uses.” *Id.* at 10. Its analysis, however, supports a different proposition, namely that the protective gear increases the safety, comfort and effectiveness of one engaged in the activity of in-line skating, and allows the participant to engage in expanded forms of the activity. *See, e.g., id.* at 12 (“Skaters who wear protective gear are more likely to relax and enjoy their skating experience.”); *id.* (“Protective gear also allows skaters to participate and achieve optimal performance in several new and popular sporting activities . . .”).

By way of contrast, the articles Customs has classified as accessories to roller skates include grind plates, skate lighting systems, skate totes, power straps, lace kits, wheel guards, skate maintenance kits, and skate covers. *See* Def.’s Mot. Summ. J. at 8 n. 4, and rulings cited therein. The United States explains that these items were clas-

sified as accessories because “[t]he function of each of these articles is **intimately and directly** related to the articles called ‘roller skates,’ not simply related to the activity called ‘roller skating.’”<sup>7</sup> *Id.* (emphasis in original).

The Court finds this distinction persuasive, particularly in light of other types of articles classified by Customs as accessories. Rollerblade and The United States contest the meaning of four Customs rulings, all of which concluded that the subject merchandise was an accessory: 1) NY D83466 (Oct. 28, 1998)(finding that probe covers are an accessory to thermometers); 2) HQ 960514 (Aug. 13, 1997)(finding that cargo-restraint nets are an accessory to automobiles); 3) HQ 953896 (Feb. 2, 1994)(finding that swimming pool test kits are an accessory to swimming pools); and 4) HQ 953713 (Aug. 11, 1993)(finding that brake lever extensions are an accessory to mountain bikes).

Rollerblade cites these rulings in support of two propositions: first, that “an accessory’s relationship to the primary article can be to improve its safety,” Pl.’s Mot. Summ. J. at 11; and second, that “Customs often classifies articles as accessories even though the articles do not enhance the performance capabilities of the object to which they relate,” *id.* at 14. While both of these statements are true, both belie the weakness of Rollerblade’s argument by emphasizing the relation between the accessory and the primary article. In the four rulings cited above, each of the items classified as an “accessory” added in some way to the thing accessorized. In this case, however, the protective gear does not add anything to the skates themselves, but rather improves the in-line skating experience because of an “addition” to the in-line skater in the form of protective gear. The skates themselves continue to function exactly as they would if the skater were not wearing the protective gear. Thus, because the primary relation between the protective gear and the skates is not between the gear and the skates themselves, the protective gear cannot be considered an accessory to roller skates.<sup>8</sup> Rollerblade argues that “Note 3 does not require that a covered accessory be an accessory to the article, or that it perform some function directly related to the article, merely that it be an accessory *suitable for use solely or principally with the article.*” Pl.’s Reply to Def.’s Response at 16. Rollerblade misreads Note 3. “Suitable for use solely or principally with the article” does not modify the term “accessories” any more than it modifies the term “parts”; rather, the phrase is a clause modifying “parts and accessories,” in effect indicating which items properly considered

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<sup>7</sup>The Court declines to comment on exactly how “intimately” the accessory and the principal article must be related. The Court finds only that to be considered an accessory, an article must relate primarily to the thing accessorized, rather than to an activity.

<sup>8</sup>Because the imported items are not accessories, Note 3 to Chapter 95, which requires that “parts and accessories which are suitable for use solely or principally with the articles of this chapter are to be classified with those articles,” does not apply. See Pl.’s Mot. Summ. J. at 16-17.

parts and accessories should be classified under Chapter 95. *See* NY C85953 (Apr. 8, 1998)(interpreting Note 3 to mean that “if the articles in question are accessories that are solely or principally used with an article of chapter 95, they must be classified under that heading, regardless of whether they are covered by another provision elsewhere in the tariff schedule.”).

II. *Whether Customs correctly classified the subject goods under subheading 9506.99.6080, HTSUS, as “other” sports equipment*

As noted above, the United States argues that the protective gear is not an accessory to roller skates, but is rather roller skating equipment. *See* Def.’s Mot. Summ. J. at 2. As there is no specific provision for roller skating equipment in the HTSUS, the United States concludes that Customs’ classification of the merchandise as “other” sports equipment under the basket provision of subheading 9506.99.6080 was correct. *See id.* at 2-3.

“Equipment” must also be defined in accordance with its common meaning, as it is defined by neither the HTSUS nor its legislative history. The Court thus turns first to the dictionary definition of “equipment.” *The American Heritage Dictionary* defines “equipment” as “Something with which a person, an organization, or a thing is equipped”; “equip,” in turn, is defined as “To supply with necessities such as tools or provisions.” *The American Heritage Dictionary* at 622. The definition of “equipment” includes the following synonym paragraph:

Synonyms: equipment, apparatus, gear, material, outfit, paraphernalia, rig, tackle. The central meaning shared by these nouns is “the materials needed for a purpose such as a task or a journey”: hiking equipment; laboratory apparatus; skiing gear; naval material; an explorer’s outfit; *sports paraphernalia*; a climber’s rig; fishing tackle.

*Id.* (emphasis added). “Paraphernalia” is defined as “The articles used in a particular activity.” *Id.* at 1313.

It should be noted that the use of “necessities” and “needed” in these definitions is misleading, as “under the modern view . . . sport equipment includes not only that which is ‘necessary’ but also that which is specially designed for use in the sport . . .” *Newman Importing Co. v. United States*, 76 Cust. Ct. 143, 144, 415 F. Supp. 375, 376 (1976). Further, Customs has ruled that “[9506’s] scope includes the requisites needed in connection with the play of sports and athletics, that being the equipment essential to the play of the game, sport or athletic activity or the equipment designed for use by the player in the training, practice and conduct of these sporting activities.” NY D85049 (Dec. 14, 1998)(emphasis added). The kind of equipment that may properly be classified under 9506 plainly includes protective equip-

ment. See Explanatory Note (B)(13) (“Requisites for other sports and outdoor games . . . , e.g.: (13) *Protective equipment* for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin guards.”)(emphasis added). See also *Slazenger’s Inc. v. United States*, 33 U.S. Customs Ct. Rpts. 338 (1954)(articles that serve “no other purpose but to aid in a safer and more efficient game . . . are within the designation of ‘equipment.’”); HQ 956582 (Mar. 14, 1995)(wrist protectors designed to perform a protective function are not sports clothing, but rather sports are equipment classifiable under 9506). Thus clarified, it is apparent that the protective gear at issue may properly be considered “equipment.” Rollerblade and the United States do not disagree that the protective gear at issue is specially designed for use in the conduct of the sport of in-line skating. See Pl.’s Stmt. at ¶¶ 7-10; Def.’s Resp. to Pl.’s Stmt. at ¶¶ 7-10.

Moreover, the protective gear at issue is not equipment that may also be considered an accessory. See Def.’s Mot. Summ. J. at 6 (“‘accessories’ may comprise a sub-set of ‘equipment’ in certain circumstances”). An example of an accessory that could be considered as falling within a sub-set of equipment is a swimming pool thermometer. In a Headquarters Ruling, Customs explained that, “The thermometers in question . . . contribute to the effectiveness of the principal article by allowing the user to determine the pool or spa’s temperature before entering the water. Thus, the thermometers are accessories.” HQ 952716 (Mar. 3, 1993). Because a thermometer is designed for use by the swimmer “in the training, practice and conduct of” swimming, it could be considered sports equipment. But because of the direct relationship between the thermometer and the principal article—the swimming pool—the thermometer is more accurately classified as an accessory. It is in this sense that an accessory may be defined as “a piece of optional equipment for convenience, comfort, etc.” *Webster’s New World Dictionary* at 4.

By way of contrast, personal flotation devices, which are also designed for use by the swimmer “in the training, practice and conduct of” swimming, have been routinely classified as sports equipment under Heading 9506. This is justified because of the close connection of this equipment to the activity of swimming, and the lack of a connection to any principal article. See NY E84582 (July 21, 1999)(“This swimming aid is designed solely to supply a buoyancy support to the beginning swimmer.”); HQ 961988 (Jan. 19, 1999)(modifying NY 829593 (July 25, 1988))(“The flotation devices here at issue are apparati for sports . . . .”); NY D85049 (Dec. 14, 1998)(“inflatable arm sleeves . . . aid children to develop basic swimming skills”).

Like the personal flotation devices, the protective gear at issue is designed primarily to help the skater develop confidence while learning to skate, and protect the skater from injury while engaged in the activity of in-line skating. If the connection of the secondary article is primarily to the activity rather than to the primary article, the secondary article does not “accessorize” the primary article, but is



rather equipment for the activity. Therefore, the protective gear is accurately considered roller skating equipment.<sup>9</sup>

There is no specific tariff provision for roller skating equipment that may not be considered an accessory. This Court will not presume that a drafting error was committed. *See, e.g., Brown Group Inc. v. United States*, 17 CIT 919, 921 (1993) (“If the drafters of the statute erred it is up to Congress to correct the error.”). Accordingly, the Court concludes that the proper tariff classification for Rollerblade’s protective gear is 9506.99.6080, HTSUS.<sup>10</sup>

#### CONCLUSION

For the foregoing reasons, the Court holds that Customs correctly classified Rollerblade’s protective gear under subheading 9506.99.6080, HTSUS. Accordingly, Rollerblade’s motion for summary judgment is denied. In turn, the United States’ motion for summary judgment is granted and judgment is entered for the United States.

Donald C. Pogue  
*Judge*

Dated: August 21, 2000  
New York, New York

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<sup>9</sup>Based on the foregoing analysis, the Court does not accept Rollerblade’s position that the terms “equipment” and “accessory” can be used interchangeably. *See* Pl.’s Mot. Summ. J. at 17. To do so would render the drafters’ use of the two terms superfluous, and would lead to a lack of predictability in determining whether merchandise should be considered “equipment” or an “accessory” for classification purposes. *See United States v. Complex Mach. Works Co.*, 23 CIT \_\_\_, \_\_\_, 83 F. Supp. 2d 1307, 1314 (1999) (“predictability of results . . . is the essence of our legal system”); *Atlas Copco N. Am. v. United States*, 17 CIT 1163, 1168, 837 F. Supp. 423, 426-27 (1993) (approving of a specific classification method because “[i]t is conducive to the steady and predictable development of the tariff law”).

<sup>10</sup>Finally, the Court notes Rollerblade’s argument that GRI 3(a) requires the protective gear be classified as accessories to roller skates because subheading 9506.70.2090 is more specific than the basket category 9506.99.6080. *See* Pl.’s Mot. Summ. J. at 18. GRI 3 only applies if the goods are, *prima facie*, classifiable under two or more headings; that is not the case here, since the goods are not classifiable as accessories under 9506.70.2090.

(Slip Op. 00-104)

ROLLERBLADE, INC., PLAINTIFF, V. UNITED STATES, DEFENDANT

Court No. 97-12-02097

**JUDGMENT**

This action has been duly submitted for decision, and this Court, after due deliberation, has rendered a decision herein; now, in conformity with that decision, it is hereby

ORDERED that Customs properly classified the imported merchandise at issue in this case under subheading 9506.99.6080, HTSUS; and it is further

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Defendant's motion for summary judgment is granted and final judgment is entered for Defendant.

Donald C. Pogue  
*Judge*

Dated: August 21, 2000  
New York, New York

(Slip Op. 00-105)

SKF USA INC., SKF FRANCE S.A. AND SARMA, PLAINTIFFS, *v.* UNITED STATES,  
 DEFENDANT, THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR.

Court No. 99-08-00475

Before: NICHOLAS TSOUCALAS, *Senior Judge*

Plaintiffs, SKF USA Inc., SKF France S.A. and Sarma (collectively “SKF”), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration’s (“Commerce”) final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 64 Fed. Reg. 35,590 (July 1, 1999). Specifically, SKF contends that Commerce unlawfully: (1) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the subject reviews of the applicable antidumping duty orders; (2) determined that it applied a reasonable duty absorption methodology and that duty absorption had occurred; (3) excluded below-cost sales from the profit calculation for constructed value under 19 U.S.C. § 1677b(e)(2) (1994); and (4) valued SKF’s major inputs under 19 U.S.C. §§ 1677b(f)(2)-(3), 1677e(a), 1677m(d) (1994).

HELD:

SKF’s USCIT R. 56.2 motion is denied in part and granted in part. The case is remanded to Commerce to annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for the subject reviews.

[SKF’s motion is denied in part and granted in part. Case remanded.]

Dated: August 23, 2000

*Steptoe & Johnson LLP* (Herbert C. Shelley and Alice A. Kipel) for plaintiffs.

*David W. Ogden*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*, Assistant Director); of counsel: *Patrick V. Gallagher* and *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

*Stewart and Stewart* (Terence P. Stewart, Wesley K. Caine, Geert De Prest and Lane S. Hurewitz) for defendant-intervenor.

## OPINION

Tsoucalas, *Senior Judge*: Plaintiffs, SKF USA Inc., SKF France S.A. and Sarma (collectively “SKF”), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade

Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 64 Fed. Reg. 35,590 (July 1, 1999).

#### BACKGROUND

This case concerns the ninth administrative review of the outstanding 1989 antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported from France for the period of review ("POR") covering May 1, 1997 through April 30, 1998. *See Final Results*, 64 Fed. Reg. at 35,590; *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, Spherical Plain Bearings, and Parts Thereof From France*, 54 Fed. Reg. 20,902 (May 15, 1989). In accordance with 19 C.F.R. § 351.213 (1998), Commerce initiated the administrative reviews of these orders on June 29, 1998, *see Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 63 Fed. Reg. 35,188, and published the preliminary results of the subject reviews on February 23, 1999, *see Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Rescission of Administrative Reviews ("Preliminary Results")*, 64 Fed. Reg. 8790. Commerce published the Final Results on July 1, 1999. *See* 64 Fed. Reg. at 35,590.

Since the administrative reviews at issue were initiated after December 31, 1994, the applicable law in this case is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995).

#### JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

#### STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of America v. United States*, 24 CIT \_\_\_, \_\_\_, 104 F. Supp. 2d 110, 115-16 (2000) (detailing Court's standard of review for antidumping proceedings).

## DISCUSSION

I. *Duty Absorption Inquiry*A. *Background*

Title 19, United States Code, § 1675(a)(4) (1994) provides that during an administrative review initiated two or four years after the “publication” of an antidumping duty order, Commerce, if requested by a domestic interested party, “shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter.” Section 1675(a)(4) further provides that Commerce shall notify the International Trade Commission (“ITC”) of its findings regarding such duty absorption for the ITC to consider in conducting a five-year (“sunset”) review under 19 U.S.C. § 1675(c), and the ITC will take such findings into account in determining whether material injury is likely to continue or recur if an order were revoked under § 1675(c). *See* 19 U.S.C. § 1675a(a)(1)(D) (1994).

On May 29, 1998 and July 29, 1998, Torrington requested that Commerce conduct a duty absorption inquiry pursuant to § 1675(a)(4) with respect to various respondents, including SKF, to ascertain whether antidumping duties had been absorbed during the ninth POR. *See Final Results*, 64 Fed. Reg. at 35,600.

In the *Final Results*, Commerce determined that duty absorption had in fact occurred for the ninth review. *See id.* at 35,591, 35,600-02. In asserting authority to conduct a duty absorption inquiry under § 1675(a)(4), Commerce first explained that for “transition orders” as defined in § 1675(c)(6)(C) (that is, antidumping duty orders, *inter alia*, deemed issued on January 1, 1995), regulation 19 C.F.R. § 351.213(j) provides that Commerce will make a duty absorption inquiry, if requested, for any antidumping administrative review initiated in 1996 or 1998. Commerce concluded that (1) because the antidumping duty orders on the AFBs in this case have been in effect since 1989, the orders are transition orders pursuant to § 1675(c)(6)(C), and (2) since this review was initiated in 1998 and a request was made, it had the authority to make a duty absorption inquiry for the ninth POR. *See id.*

B. *Contentions of the Parties*

SKF contends that Commerce lacked authority under § 1675(a)(4) to conduct a duty absorption inquiry for the ninth POR of the outstanding 1989 antidumping duty orders. *See* SKF’s Br. Supp. Mot. J. Agency R. at 2, 16-23 (“SKF’s Br.”); SKF’s Reply Br. at 2-30. In the alternative, SKF asserts that even if Commerce possessed the authority to conduct such an inquiry, Commerce’s methodology for determining duty absorption was contrary to law and, accordingly, the case should be remanded to Commerce to reconsider its methodology. *See* SKF’s Br. at 3, 23-44; SKF’s Reply Br. at 30-42.

Commerce argues that it: (1) properly construed subsections (a)(4)

and (c) of § 1675 as authorizing it to make a duty absorption inquiry for antidumping duty orders that were issued and published prior to January 1, 1995; and (2) devised and applied a reasonable methodology for determining duty absorption. See Def.'s Mem. in Opp'n to Pls.' Mot. J. Agency R. at 2, 5-28 ("Def's Br."). Also, Commerce asserts that no statutory provision or legislative history specifically provides that Commerce is "precluded" from conducting a duty absorption inquiry with respect to merchandise covered by a transition order. See *id.* at 2, 16.

The Torrington Company ("Torrington") generally agrees with Commerce's contentions. See Torrington's Resp. to Pls.' Mot. J. Agency R. at 2-4, 8-43 ("Torrington's Resp."). In addition, Torrington asserts that Commerce has the "inherent" authority, aside from § 1675(a)(4), to conduct a duty absorption inquiry in any administrative review. See *id.* at 3, 32-40.

### C. Analysis

In *SKF USA Inc. v. United States*, 24 CIT \_\_, 94 F. Supp. 2d 1351 (2000), this Court determined that Commerce lacked statutory authority under § 1675(a)(4) to conduct a duty absorption inquiry for antidumping duty orders issued prior to the January 1, 1995 effective date of the URAA. See *id.* at \_\_, 94 F. Supp. 2d at 1357-59. The Court noted that Congress expressly prescribed in the URAA that § 1675(a)(4) "must be applied prospectively on or after January 1, 1995 for 19 U.S.C. § 1675 reviews." *Id.* at 1359 (citing URAA's § 291).

Because Commerce's duty absorption inquiry, its methodology and the parties' arguments at issue in this case are practically identical to those presented in *SKF USA*, the Court adheres to its reasoning in *SKF USA*. Moreover, contrary to Torrington's assertion, the Court finds that Commerce does not have the "inherent" authority to conduct a duty absorption inquiry in any administrative review. Rather, the statutory scheme, as noted, clearly provides that the inquiry must occur in the second or fourth administrative review after the publication of the antidumping duty order, not in any other review, and upon the request of a domestic interested party. Accordingly, the Court finds that Commerce did not have statutory or inherent authority to undertake a duty absorption investigation for the outstanding 1989 antidumping duty orders in dispute here.

## II. Profit Calculation for Constructed Value

### A. Background

For this POR, Commerce used constructed value ("CV") as the basis for normal value ("NV") "when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 64 Fed. Reg. at 8795. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A) (1994). See *Final Results*, 64 Fed. Reg. at 35,611. Specifically, in calculating CV, the statutorily preferred method is to calculate an amount



for profit based on “the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review . . . in connection with the production and sale of a foreign like product [made] in the ordinary course of trade, for consumption in the foreign country.” 19 U.S.C. § 1677b(e)(2)(A).

In applying the preferred methodology for calculating CV profit, Commerce determined that “an aggregate calculation that encompasses all foreign like products under consideration for normal value represents a reasonable interpretation of [§ 1677b(e)(2)(A)]” and “the use of [such] aggregate data results in a reasonable and practical measure of profit that [Commerce] can apply consistently where there are sales of the foreign like product in the ordinary course of trade.” *Id.* Also, in calculating CV profit under § 1677b(e)(2)(A), Commerce excluded below-cost sales from the calculation which it disregarded in the determination of NV pursuant to 19 U.S.C. § 1677b(b)(1) (1994). *See id.* at 35,612.

#### *B. Contentions of the Parties*

SKF contends that Commerce’s use of aggregate data encompassing all foreign like products under consideration for NV in calculating CV profit is contrary to § 1677b(e)(2)(A). *See* SKF’s Br. at 44-67. Instead, SKF claims that Commerce should have relied on the alternative methodology of § 1677b(e)(2)(B)(i), which provides a CV profit calculation that is similar to the one Commerce used, but does not limit the calculation to sales made in the ordinary course of trade, that is, below-cost sales are not excluded from the calculation. *See id.* at 3, 44-63. SKF also asserts that if Commerce’s exclusion of below-cost sales from the numerator of the CV profit calculation is lawful, Commerce should nonetheless include such sales in the denominator of the calculation to temper bias which is inherent in the agency’s dumping margin calculations. *See id.* at 4, 63-67.

Commerce responds that it properly calculated CV profit pursuant to § 1677b(e)(2)(A) based on aggregate profit data of all foreign like products under consideration for NV. *See* Def.’s Br. at 2-3, 28-51. Consequently, Commerce maintains that since it properly calculated CV profit under subparagraph (A) rather than (B) of § 1677b(e)(2), it correctly excluded below-cost sales from the CV profit calculation. *See id.* Torrington agrees with Commerce’s methodology for calculating CV profit. *See* Torrington’s Resp. at 4-5, 44-50.

#### *C. Analysis*

In *RHP Bearings Ltd. v. United States*, 23 CIT \_\_\_, 83 F. Supp. 2d 1322 (1999), this Court upheld Commerce’s CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at \_\_\_, 83 F. Supp. 2d at 1336. Since Commerce’s CV profit methodology and SKF’s arguments at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning

in *RHP Bearings*. The Court, therefore, finds that Commerce's CV profit methodology is in accordance with law.

Moreover, since (1) § 1677b(e)(2)(A) requires Commerce to use the actual amount for profit in connection with the production and sale of a foreign like product in the ordinary course of trade, and (2) 19 U.S.C. § 1677(15) (1994) provides that below-cost sales disregarded under § 1677b(b)(1) are considered to be outside the ordinary course of trade, the Court finds that Commerce properly excluded below-cost sales from the CV profit calculation.

### III. Valuation of Major Inputs from Affiliated Persons

#### A. Statutory Background

In general, the NV of the subject merchandise is, in pertinent part, "the price at which the foreign like product is first sold . . . for consumption in the exporting country." 19 U.S.C. § 1677b(a)(1)(B)(i) (1994). However, whenever Commerce has "reasonable grounds to believe or suspect" that sales of the foreign like product under consideration for the determination of NV have been made at prices which represent less than the cost of production ("COP") of that product, Commerce shall determine whether, in fact, such sales were made at less than the COP. *See* § 1677b(b)(1). A "reasonable ground" exists if Commerce disregarded below-cost sales of a particular exporter or producer from the determination of NV in the most recently completed administrative review. *See* § 1677b(b)(2)(A)(ii). If Commerce determines that there are sales below the COP and certain conditions are present under § 1677b(b)(1)(A)-(B), it may disregard such below-cost sales in the determination of NV. *See id.*

Additionally, the special rules for the calculation of COP or CV contained in 19 U.S.C. § 1677b(f)(2)-(3) (1994), provide that, in a transaction between affiliated persons as defined in 19 U.S.C. § 1677(33) (1994), Commerce may disregard either the transaction or the value of a major input.

Section 1677b(f)(2) provides that Commerce may disregard an affiliated-party transaction when "the amount representing [the transaction or transfer price] does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration [that is, an arms-length or market price]." If such "a transaction is disregarded . . . and no other transactions are available for consideration," Commerce shall value the cost of an affiliated-party input "based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated [that is, based on an arms-length or market value]." 19 U.S.C. § 1677b(f)(2) ("fair-value" provision).

Section 1677b(f)(3)'s "major input rule" directs that if (1) a transaction between affiliated companies involves the production by one of such companies of a "major input" to the merchandise produced by the other, and (2) Commerce has "reasonable grounds to believe or suspect" that the amount reported as the value of such input is below the

COP, then Commerce may calculate the value of the major input on the basis of the data available regarding such COP, if such COP exceeds the market value of the input, as determined under § 1677b(f)(2). For purposes of § 1677b(f)(3), regulation 19 C.F.R. § 351.407(b) (1998) provides that Commerce will value a major input supplied by an affiliated party based on the highest of (1) the actual transfer price for the input, (2) the market value of the input, or (3) the COP of the input.

### *B. Factual Background*

Because Commerce disregarded sales that failed the below-cost sales test pursuant to § 1677b(b)(1) in the prior review with respect to SKF's AFBs from France, Commerce determined pursuant to § 1677b(b)(2)(A)(ii) that it had "reasonable grounds to believe or suspect" that sales of SKF's foreign like product under consideration for the determination of NV in this ninth review might have been made at prices below the COP. *See Preliminary Results*, 64 Fed. Reg. at 8794. Consequently, pursuant to § 1677b(b)(1), Commerce initiated COP investigations of SKF's sales in the home market and, thereby, requested information relating to the COP and CV. *See id.*

In its questionnaire for this POR, Commerce requested, *inter alia*, that SKF provide certain data regarding the valuation of major inputs received from affiliated suppliers and used to produce the merchandise under review during the cost calculation period. *See SKF's Br. App.*, Ex. 6, Commerce's Request for Information at D-3 and D-4. In particular, Commerce instructed SKF as follows:

List the major inputs received from affiliated parties and used to produce the merchandise under review during the cost calculation period. . . . For each major input identified, provide the following information:

- a. the total volume and value of the input purchased from all sources by your company during the cost calculation period, and the total volume and value purchased from each affiliated party during the same period;
- b. the per-unit transfer price charged for the input by the affiliated party (if the affiliated party sells the identical input to other, unaffiliated purchasers, provide documentation showing the price paid for the input by the unaffiliated purchaser; if your company purchases the identical input from unaffiliated suppliers, provide documentation showing the unaffiliated party's sales price for the input); and
- c. If you are responding to this section of the questionnaire in connection with an investigation of sales below cost, provide the per-unit cost of production incurred by the affiliated party in producing the major input.

. . . .

With respect to I.D., when valuing the cost of major inputs purchased from affiliates, use the highest of:] a) the transfer price from the affiliate[; b) the affiliate's cost of production of the input; or c) the market price of the input (the weighted-average price other unaffiliated suppliers charged for the identical input). . . . In addition, in order to facilitate verification, please report, for each model which includes affiliated-party inputs, the affiliate's cost of production, transfer price, and market price of all affiliated-party inputs used in the manufacture of the product on your computer tape. *Id.* at D-3, D-4, V-12.

In its response to Commerce's questionnaire, SKF reported that it valued major inputs purchased from affiliated suppliers based on the higher of the actual component (that is, input) costs or transfer prices, but it did not take into consideration the market prices for some components which it purchased from both affiliated and unaffiliated suppliers. See SKF's Br. App., Ex. 7, SKF's Sect. D Response to Commerce's Questionnaire at D-14 (Aug. 28, 1998) (noting that "SKF sources requirements from unaffiliated suppliers for only a small group of components [and that] SKF rarely buys the same components from both affiliated and unaffiliated suppliers"). With respect to market prices, SKF explained that "whether [components are] sourced from within the [SKF] Group or from an unaffiliated supplier, all SKF components are custom-made items, each conforming to SKF's proprietary designs and specifications in order to insure compatibility in assembly and quality." *Id.* As a consequence of its unique product specifications, SKF stated that "referent market prices" do not exist for components purchased by SKF from its affiliated companies. SKF thereby used the higher of cost or transfer price in computing COP and CV. *See id.* at D-17.

Given that SKF stated in its response that it purchased major inputs from its affiliated suppliers as well as in rare cases from unaffiliated suppliers, Commerce issued a supplemental questionnaire on October 26, 1998 requesting that SKF provide further information to better evaluate the market values of SKF's major inputs. See SKF's Br. App., Ex. 8, Commerce's Supplemental Questionnaire at 9. Specifically, Commerce asked SKF the following:

At Appendix D-4, you provide ratios of cost to transfer prices for major inputs purchased by SKF France from affiliated parties. However, in your supplemental response, we request that you provide a chart listing, for each major input, the per-unit transfer price charged by the affiliated party and the per-unit cost of production incurred by the affiliated party. Furthermore, on page D-16, you state that there were rare cases in which SKF France purchased identical or similar products from an unaffiliated supplier. For these inputs, include in your chart the unaffiliated party's sales price and provide documentation to support these prices.

*Id.*

On November 16, 1998, SKF responded by submitting: (1) two charts listing the total cost, total sales and the transfer price index (that is, the ratio of total cost divided by total sales) for each type of major input, but without any model or part designations; and (2) a chart showing the average unit price for major input purchased from unaffiliated suppliers and identified by model number. See SKF's Br. App., Ex. 9, SKF's Response to Commerce's Supplemental Questionnaire at D-13 and D-14. With respect to the unaffiliated-party chart, SKF only provided documentation for one particular model input. See *id.* at D-14. SKF explained that it included documentation for only one input because "[d]ocumentation for each of the listed designations would be voluminous and require significant expenditure of resources just prior to verification. . . . Should [Commerce] request similar documentation for additional designations at verification, SKF would gather and provide the relevant information at that time." *Id.* at 51.

Subsequently, on February 16, 1999, Commerce verified SKF's COP and transfer price responses regarding the inputs, but did not verify the market value of the materials. See SKF's Br. App., Ex. 10, Commerce's Verification Report at 11. A week later, Commerce issued the *Preliminary Results* and stated that it would use "partial facts available" under 19 U.S.C. § 1677e (1994) "in cases in which [it was] unable to use some portion of a response in calculating the dumping margin," but made no specific reference to SKF's partial response regarding the market value of its major inputs. 64 Fed. Reg. at 8793 (Feb. 23, 1999).

For the *Final Results*, Commerce found that the market-price data SKF provided for components purchased from unaffiliated parties was not in a comparable form in which it reported the COP and transfer price data, "that is, the COP and transfer price values were reported as ratios (which represented the difference between COP and transfer price for each component) and the market values were not." SKF's Br. App., Ex. 11, Commerce's Final Analysis Mem. at 2 (June 16, 1999); see *Final Results*, 64 Fed. Reg. at 35,600 (July 1, 1999). Consequently, Commerce noted that it could not determine whether the market price was higher than the reported COP or transfer price for each major input. See *id.* Commerce stated that since SKF failed "to provide the requested information in the form and manner requested," it used partial facts available under § 1677e(a)(2)(B) to fill in the gaps and ensure that the market prices were taken into consideration. *Id.* In particular, Commerce applied partial facts available (that is, market price information SKF provided in response to Commerce's questionnaires) to make an adjustment to: (1) SKF's reported total cost of manufacturing for each transaction in the COP and CV databases; and (2) the variable cost of manufacturing in the home market and United States sales databases. See *id.*; SKF's Br. App., Ex. 11, Commerce's Final Analysis Mem. at 2.

*C. Contentions of the Parties*

SKF contends that Commerce erred in concluding in the *Final Results* it was “required” to use market prices for valuing certain inputs the French SKF companies purchased from affiliated parties. *See* SKF’s Br. at 69 (citing 64 Fed. Reg. at 35,599). Quoting *AK Steel Corp. v. United States*, 203 F.3d 1330, 1343 (Fed. Cir. 2000) (holding that “the plain language of the statute . . . provides that Commerce ‘may’ determine the values in a manner other than the use of the transfer price”) and regulation 19 C.F.R. § 351.407(b) (stating that “the Secretary normally will determine the value of a major input purchased from an affiliated person based on the higher of [transfer price, market price or COP]”), SKF notes that the fair-value and major-input provisions (that is, 19 U.S.C. § 1677b(f)(2)-(3)) are “permissive” and, therefore, do not “mandate” that Commerce use the highest of transfer price, market price or COP in valuing SKF’s reported affiliated-party inputs. *See id.* at 67-69.

SKF also asserts that Commerce’s “reliance on non-affiliated-party prices was contrary to substantial record evidence.” *Id.* at 4. SKF notes that because the overlap between identical inputs which were purchased from affiliated and unaffiliated suppliers was minimal, and since all of SKF’s components are custom-made and conform to its proprietary designs and specifications, “there is no readily observable market for the unique inputs by [SKF].” *Id.* at 72. SKF argues that since there were no valid referent market prices for the major inputs at issue, its valuation of these inputs based on the higher of COP or transfer price was in accordance with § 1677b(f)(2)-(3). *See id.* at 67.

Additionally, SKF contends that Commerce’s rejection of SKF’s reporting of the higher of COP or transfer price of inputs purchased from affiliated and unaffiliated suppliers, in the absence of readily observable market prices, was contrary to Commerce’s practice in prior AFB reviews. *See id.* at 67, 85. SKF maintains that since Commerce failed to provide “a reasoned explanation for [its] departure from prior practice,” Commerce’s resort to partial facts available was unwarranted. *Id.* at 88.

SKF further argues that Commerce unlawfully used partial facts available in its cost calculations for the French SKF Group companies because the statutory criteria Commerce relied on for such use were not present. *See id.* at 5, 67, 74. In particular, SKF notes that Commerce resorted to partial facts available because SKF failed to provide requested information in the form and manner requested as required by § 1677e(a)(2)(B), that is, Commerce asserted in its final analysis memorandum that SKF did not provide “the market price data in the form which we requested (on a chart and in a comparable form as its transfer price and COP data).” *Id.* at 74 (quoting SKF’s Br. App., Ex. 11, Commerce’s Final Analysis Mem. at 2). SKF argues that, contrary to Commerce’s assertion in the final analysis memorandum, nothing in the supplemental questionnaire specifically instructed or “identified that the reporting of unaffiliated-party purchases was to be pro-



vided in a manner to permit Commerce to draw a comparison with affiliated-party purchases.” SKF’s Reply Br. at 66. SKF notes that “[t]he sole format specified in the response was that the [unaffiliated-party sales price] data be in chart form” and, in fact, SKF did “provide such ‘prices’ in chart form.” *Id.* at 65. With respect to Commerce’s request for per-unit transfer price and COP data, SKF notes that in its supplemental response it explained that it does not use such per-unit data from affiliated parties; rather, it reported that it applies a transfer price index in its cost calculations, to ensure that the higher of cost or transfer price is reflected in its actual cost of manufacturing figures reported to Commerce. *See id.*; SKF’s Br. at 82-83, Br. App., Ex. 9 at 49. Also, SKF notes this reporting methodology of transfer price indices had been utilized by SKF and accepted and/or verified by Commerce in prior reviews. *See* SKF’s Reply Br. at 65 n.53. SKF, therefore, maintains that it fully and reasonably answered Commerce’s questions as asked and Commerce thus erred in resorting to partial facts available. *See id.* at 64-69.

Furthermore, SKF contends that, contrary to the requirements of 19 U.S.C. § 1677m(d) (1994), Commerce did not provide notice to SKF that its market price data had deficiencies and, “to the extent practicable,” allow SKF to remedy such deficiencies. *Id.* at 79 (quoting § 1677m(d)). Given the seventh month period between (1) SKF’s responses to Commerce’s supplemental questionnaire (that is, November 16, 1998) and (2) Commerce’s adverse findings in the *Final Results* regarding SKF’s major inputs (that is, July 1, 1999), SKF argues that there was ample time for Commerce to issue a second supplemental questionnaire, inform SKF of its alleged deficiencies and give it an opportunity to remedy them. *See id.* at 79. SKF asserts that since Commerce failed to direct another request for information, the agency improperly resorted to facts otherwise available under § 1677m(d). *See id.* Alternatively, SKF argues that even if Commerce’s use of partial facts available was justified, it erred in its methodology for determining market prices for affiliated-party inputs. *See* SKF’s Br. at 88-89.

SKF, therefore, requests that the Court remand the matter and instruct Commerce to recalculate costs for SKF based on data submitted by SKF and without resort to partial facts available or, alternatively, if Commerce’s use of partial facts available is warranted, to correct the methodology it used for calculating market prices for affiliated party-inputs. *See id.* at 94-95; SKF’s Reply Br. at 82-83.

Commerce argues, *inter alia*, that it reasonably interpreted § 1677b(f)(2) and (f)(3) as requiring it to value a major input purchased from an affiliated person at the highest of the COP, transfer price or market price. *See* Def.’s Br. at 3, 51-61. Consequently, Commerce asserts that it “properly requested SKF to submit such information for its major inputs.” *Id.* at 62.

Commerce also maintains that even if the fair-value and major input provisions are permissive, it is within its discretion to apply the

provisions. *See id.* at 62. Commerce contends “that since, by SKF’s own admission, some inputs were manufactured by affiliated and unaffiliated suppliers, Commerce properly exercised its discretion in applying the statutory provisions in question.” *Id.* at 63. Commerce also notes that the fact it may not have applied the provisions in prior AFB reviews, does not make Commerce’s decision to apply them in this review unreasonable. *See id.* at 62. Moreover, Commerce notes that no change of practice from its prior reviews occurred during this review because Commerce simply followed its regulations. *See id.*

Commerce also argues that irrespective of SKF’s assertion that there was no readily observable market for the unique inputs purchased by SKF, § 1677b(f)(2) authorizes Commerce to value a transaction between affiliated persons based on the amount that unaffiliated persons charged. *See id.* at 63. Commerce thereby maintains that “[t]he application of the statute does not depend upon the existence of any ‘readily observable market.’” *Id.*

Commerce further notes that, contrary to SKF’s assertion, its request for information in the supplemental questionnaire contemplated that SKF would provide the market-price data relating to major inputs it purchased from unaffiliated suppliers on a chart and in a form readily comparable to SKF’s COP and transfer price data. *See id.* at 64-66. Commerce, therefore, argues that since SKF failed to submit such information in the form requested in the supplemental questionnaire, Commerce properly resorted to facts otherwise available under §§ 1677e(a) and 1677m(d) in valuing SKF’s major inputs. *See id.* at 65-67. Moreover, Commerce maintains that its methodology for calculating the value of these inputs was reasonable. *See id.* at 67-69.

Torrington agrees with Commerce, noting that Commerce’s instructions set forth in the supplemental questionnaire are entirely consistent with its finding in the *Final Results* that SKF did not provide the market-price data of the major inputs in the form in which Commerce requested. *See Torrington’s Resp.* at 58. Torrington also notes that the questionnaire did not instruct or allow SKF to provide comparison data as a percentage ratio of COP only and, thus, there is no merit to SKF’s contention that Commerce’s questionnaire did not request SKF’s cost data in the form in which Commerce now claims it was requested. *See id.* at 57-58. Moreover, contrary to SKF’s assertion that the market-price data provided was in a usable form, Torrington asserts the data clearly did not permit Commerce to make an appropriate comparison to the relevant COP and transfer price of each major input. *See id.*

Torrington also asserts that Commerce’s use of facts available was not inconsistent with § 1677m(d) because Commerce provided notice to SKF in the supplemental questionnaire that its initial response to Commerce’s questionnaire was deficient and requested specific additional information. *See id.* at 59. Torrington asserts that § 1677m(d) “does not impose on Commerce a further requirement to provide additional notice, i.e., a second supplemental questionnaire, as SKF contends.” *Id.*

Moreover, Torrington argues that SKF's reliance on Commerce's acceptance of SKF's reporting methodology for major inputs in prior reviews is misplaced because "each . . . administrative review is an independent and distinct proceeding." *Id.* Torrington maintains that the fact that the same aspects of SKF's reporting methodology of major inputs were not pursued in other AFB reviews cannot excuse SKF from responding to Commerce's inquiries in this review. *See id.* at 60. Similarly, Torrington contends that Commerce's methodology for valuing the major inputs "was reasonable in light of SKF's extensive reporting failures." *Id.*

#### *D. Analysis*

The Court disagrees with SKF that Commerce erred in valuing each major input based on the highest of the input's transfer price, market price or COP. In *Mannesmannrohren-Werke AG v. United States*, 23 CIT \_\_, \_\_, 77 F. Supp. 2d 1302, 1310-12 (1999), the Court clearly articulated that the plain language of § 1677b(f)(2) and (f)(3), as well as the legislative history of § 1677b(f)(3), supports Commerce's use of the highest of transfer price, market price or COP in valuing a major input supplied by an affiliated party. Further, although the Court agrees with SKF that use of the word "may" in the fair-value and major-input provisions indicates that the provisions and regulation 19 C.F.R. § 351.407(b) are "permissive" and, thus, do not mandate the use of highest of transfer price, market price or COP in valuing affiliated-party inputs, *see* § 1677b(f)(2)-(3) (both provisions using word "may" instead of "shall"), the Court notes that "[t]he word 'may,' when used in a statute, usually implies some degree of discretion." *United States v. Rodgers*, 461 U.S. 677, 706 (1983) (footnote omitted). Certainly, "[t]his common-sense principle of statutory construction . . . can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." *Id.* (citations omitted). Here, the Court finds no such contrary indications or inferences with respect to § 1677b(f)(2)-(3) and, therefore, concludes that Commerce properly determined that it had discretionary authority to use the highest of transfer price, market price or COP in valuing SKF's reported major inputs. Indeed, in *AK Steel*, the appellate court opined that the antidumping "statute leaves possible application of the fair-value and major-input provisions to the discretion [of] the agency." Moreover, the fact that Commerce may not have applied the provisions in prior AFB reviews, does not make Commerce's exercise of discretion to apply them in this review unreasonable. 203 F.3d at 1343.

Also, the Court finds that Commerce properly resorted to "facts otherwise available" in valuing SKF's major inputs. The antidumping statute mandates, *inter alia*, that Commerce use "facts otherwise available" if an interested party fails to provide the requested information in the form and manner requested, subject to 19 U.S.C. § 1677m(c)(1), (d), (e). *See* 19 U.S.C. § 1677e(a)(2). Here, upon review of the record, the Court finds that Commerce did in fact request that SKF provide

market price information on major inputs it purchased from unaffiliated suppliers on a chart and in a form comparable to its COP and transfer price data. As noted earlier, Commerce's initial questionnaire specifically requested that SKF provide (1) the per-unit transfer price, market price and COP data for each major input identified and (2) the use of the highest of the transfer price, COP or market price when valuing the cost of major inputs purchased from affiliates. See SKF's Br. App., Ex. 6, Commerce's Request for Information at D-3, D-4, V-12. Commerce's supplemental questionnaire also requested, as noted earlier, that SKF provide a chart listing, for each major input, (1) the per-unit COP incurred by the affiliated party, (2) the per-unit transfer price charged by the affiliated party, and (3) for rare cases in which SKF purchase identical or similar products from an unaffiliated supplier, the unaffiliated party's sales price. See SKF's Br. App., Ex. 8, Commerce's Supplemental Questionnaire at 9. Although Commerce's framing of its questions regarding major inputs in the supplemental questionnaire are less than a model of clarity, Commerce's Court No. 99-08-00475 Page 32 questions in both questionnaires when read together indicate that Commerce was asking SKF to provide market-price information for major inputs purchased from its unaffiliated suppliers on a chart in a comparable form in which it reported the COP and transfer price information. The Court, therefore, finds that Commerce correctly determined under § 1677e(a)(2)(B) that SKF failed to provide the requested information in the form and manner requested.

To the extent that SKF argues that Commerce had an obligation under § 1677m(d) to provide a second supplemental questionnaire to inform SKF of its deficient response and give it an opportunity to remedy it, SKF's argument must also fail. Section 1677m(d) provides that if Commerce finds that a response to a request for information does not comply with the request, Commerce shall promptly inform the person submitting the response of the deficiency and permit that person an opportunity to remedy or explain the deficiency. If the remedial response or explanation provided by the party is found to be unsatisfactory or untimely, Commerce may, subject to § 1677m(e), disregard "all or part of the original and subsequent responses" in favor of facts otherwise available. *Id.* § 1677m(d). In this case, Commerce provided SKF with notice and an opportunity in the supplemental questionnaire to clarify its market-price information relating to its major inputs purchased from its unaffiliated suppliers. Thus, to the extent that Commerce was statutorily obligated to provide SKF an opportunity to remedy or explain the alleged deficiencies, the Court finds that Commerce fulfilled its obligation under § 1677m(d) as well as § 1677m(e). In other words, as Torrington correctly asserts, § 1677m(d) does not impose on Commerce a requirement that it must provide an additional notice and opportunity to remedy a deficiency, that is, issue a second supplemental questionnaire.

The Court has considered SKF's other contentions and finds them to be entirely without merit. Also, the Court finds that Commerce's

methodology for valuing the major inputs was reasonable in light of SKF's shortcomings in its responses to Commerce's requests for information. Accordingly, the Court finds that Commerce properly resorted to partial facts available in calculating the value of SKF's major inputs.

CONCLUSION

For the foregoing reasons, the case is remanded to Commerce to annul all findings and conclusions made pursuant to the duty absorption inquiries conducted for the subject reviews. Commerce's final determination is affirmed in all other respects.

NICHOLAS TSOUCALAS  
*Senior Judge*

Dated: August 23, 2000  
New York, New York